

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CARLENE BECHEN, ELVIRA)	
BUMPUS, RONALD BIENDSEIL, LESLIE W.)	
DAVIS, III, BRETT ECKSTEIN, GLORIA)	
ROGERS, RICHARD KRESBACH, ROCHELLE)	
MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE)	
SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS)	
THYSSEN, CINDY BARBERA, RON BOONE, VERA)	
BOONE, EVANJELINA CLEERMAN, SHEILA)	
COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON,)	Case No. 11-CV-562
RICHARD LANGE, and GLADYS MANZANET,)	JPS-DPW-RMD
)	
Plaintiffs,)	
)	Milwaukee, Wisconsin
TAMMY BALDWIN, GWENDOLYNNE MOORE and)	
RONALD KIND,)	February 24, 2012
)	1:50 p.m.
Intervenor-Plaintiffs,)	
)	VOLUME VIII
v.)	P.M. SESSION
)	
Members of the Wisconsin Government)	
Accountability Board, each only in his)	
official capacity; MICHAEL BRENNAN,)	
DAVID DEININGER, GERALD NICHOL, THOMAS)	
CANE, THOMAS BARLAND, and TIMOTHY VOCKE,)	
and KEVIN KENNEDY, Director and General)	
Counsel for the Wisconsin Government)	
Accountability Board,)	
)	
Defendants,)	
)	
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TRANSCRIPT OF COURT TRIAL

BEFORE DIANE WOOD, CIRCUIT JUDGE; ROBERT DOW, JR., DISTRICT
JUDGE, and J.P. STADTMUELLER, DISTRICT JUDGE

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F. JAMES SENSENBRENNER, JR., THOMAS E.
 PETRI, PAUL D. RYAN, JR., REID J.
 RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

VOCES DE LA FRONTERA, INC., RAMIRO
 VARA, OLGA VARA, JOSE PEREZ, and
 ERICA RAMIREZ,

Plaintiffs,

v.

Members of the Wisconsin Government
 Accountability Board, each only in his
 official capacity; MICHAEL BRENNAN,
 DAVID DEININGER, GERALD NICHOL, THOMAS
 CANE, THOMAS BARLAND, and TIMOTHY VOCKE,
 and KEVIN KENNEDY, Director and General
 Counsel for the Wisconsin Government
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Defendants.

Case No. 11-CV-1011
 JPS-DPW-RMD

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THE BAILIFF: All rise.

JUDGE STADTMUELLER: Let the record reflect that we've reconvened in the bench trial of Baldus, et al. versus Brennan, et al. Mr. Poland, you may continue with your questions.

MR. POLAND: Thank you, your Honor.

CROSS-EXAMINATION (Continued)

BY MR. POLAND:

Q Dr. Gaddie, I'd like you to take a look at Exhibit 63, please. I think we had left off talking about that exhibit before the lunch break.

A Yes.

Q And turning your attention again, Dr. Gaddie, these notes again reflect your assessment of the situation in creating Districts 8 and 9; correct?

A Yes.

Q And turning your attention to paragraph 5, you ask the question are any groups coming out in opposition. Do you see that?

A Yes.

Q You asked that because the legislature needs to take into consideration the community's concerns and ascertain what they are before they make their choices in attempt to reflect the community's will in a matter like this; correct?

1 A Yes, this reflects my intention to having community input in
2 the process, yes.

3 Q And part of the work that you did in looking at these
4 districts is you looked at them on the basis of turnout data;
5 correct?

6 A Yes.

7 Q And you concluded you couldn't get the percentage high
8 enough to get a majority Hispanic turnout?

9 A That's correct.

10 Q Now, Dr. Gaddie, turnout is important in assessing Latino
11 voting power; correct?

12 A Yes.

13 Q And the Latino community had a very low turnout rate in
14 District 8; correct?

15 A Yes.

16 Q Did you make any attempt to your correlate that turnout rate
17 to the newly proposed Assembly district?

18 A No.

19 Q Why not?

20 A Because I was not sure which Assembly district would be the
21 new Assembly district.

22 Q And it's true you never saw data from the final map you were
23 retained in this litigation; correct?

24 A Correct.

25 Q Now, you told the lawyers at Michael Best and the other

1 folks working for the legislature that comparatively that the
2 Hispanic community of Milwaukee in the old 8th Assembly
3 District a very low turnout rate; correct?

4 A Yes.

5 Q And the white turnout rate in those districts would have
6 been higher; correct?

7 A Yes.

8 Q And that could be anywhere from two to four times higher?

9 A Yes.

10 Q Now, Dr. Gaddie, again with Exhibit 63, you told either
11 Mr. Foltz, Mr. Handrick or Mr. McLeod about the concerns that
12 you expressed in paragraph 5; correct?

13 A Yes.

14 Q And you expected that they would go to the community;
15 correct?

16 A Yes.

17 Q If there was a group called Latino Redistricting Committee
18 that purported to be a coalition of every community
19 organization in the area, you would have expected your clients
20 to be aware of them; correct?

21 A I suppose some, yes of them, yes.

22 Q And you and Mr. Troupis discussed the importance of getting
23 good input to draw a good district; correct?

24 A Briefly, yes.

25 Q Dr. Gaddie, I'd like you to take a look, please, at

1 Exhibit No. 71.

2 A Yes.

3 Q Now, this is an e-mail that you and others received on
4 June 6th, 2011; correct?

5 A I do not a recall receiving this e-mail. I'm not on the --
6 I'm on the receipt list for the first e-mail at 8:00 p.m.

7 MR. KELLY: Your Honor, I'm going to object. The
8 stipulation between the parties is that the intent element of
9 their Voting Rights Act claims have been dismissed as have
10 their partisan gerrymandering claims. So this doesn't really
11 go to any remaining issue in the case.

12 JUDGE STADTMUELLER: Mr. Poland?

13 MR. POLAND: I'd be happy to argue it right now,
14 your Honor, certainly. The point that I'm going to make is
15 there is an express reference to Voces de la Frontera. This is
16 on June 6th, 2011. We're clearly getting into whether the
17 redistricting team actually went out into the community and
18 obtained the community support in the Latino community from all
19 the groups that were known to it at the time. It might have
20 been important to do that.

21 MR. KELLY: And, of course, that has nothing to do
22 with the constitutionality of Act 43 in the absence of any
23 claims of intentional discrimination or political
24 gerrymandering.

25 JUDGE STADTMUELLER: That may be, Mr. Kelly, but as

1 the Court noted earlier in the trial, ultimately the Court will
2 be in the best position to make that evaluation and against
3 that backdrop the Court is constrained to overrule the
4 objection. You may continue with your questions.

5 MR. POLAND: Thank, your Honor.

6 BY MR. POLAND:

7 Q Dr. Gaddie, the date of this e-mail is June 6, 2011;
8 correct?

9 A Yes.

10 Q It's an e-mail that Mr. Foltz sent to a number of
11 recipients; correct?

12 A Correct.

13 Q You are one of the recipients on this e-mail; correct?

14 A Correct.

15 Q You don't recall receiving it right now?

16 A No. I was -- I mean, having seen this, and this was brought
17 to my attention in deposition as well, at the time this e-mail
18 was sent, I was on a ship headed for the Dutch Antilles. My
19 wedding anniversary is two days after this, so I was
20 incommunicado for this entire week.

21 Q Dr. Gaddie, you see that the heading of this e-mail is the
22 Hispanic community speaks in Milwaukee; correct?

23 A Yes.

24 Q You don't deny that you received this e-mail, do you?

25 A No, no.

1 Q Now, as of June 6th, 2001, the redistricting team, which
2 includes Mr. Troupis, Mr. McLeod, Mr. Ottman, Mr. Handrick and
3 Mr. Foltz, they were being asked to consider how the issues in
4 this press release relate to the team's thinking about
5 District 8; correct?

6 A That's what it says here in the e-mail, yes.

7 Q All right, and that's down at the bottom; right? Any
8 thoughts on how this could tie into our current thought process
9 regarding the South Side?

10 A Yes.

11 Q And specifically, in the first paragraph just under team, it
12 says "Please take a look at the attached press release from
13 Voces de la Frontera regarding Milwaukee's aldermanic
14 districts." Notes that they're lobbying for a third Hispanic
15 aldermanic district and increasing the Hispanic voting age
16 population in the proposed Hispanic districts; correct?

17 A Yes.

18 Q Do you know whether anyone on the redistricting team ever
19 contacted Voces de la Frontera to get its input on
20 Assembly District 8?

21 A I have no idea.

22 Q Dr. Gaddie, could you take a look at Exhibit 77, please?

23 A Yes.

24 Q And I'd like to draw your attention to the very last e-mail
25 in the chain, which is on the bottom of page 2 and the top of

1 page 3.

2 A Yes.

3 Q Mr. Ottman is providing this information for you on July 17
4 in response to a question that you had; correct?

5 A Now, let's see. I have a contact from Jim Troupis, if we go
6 back to the beginning of the chain, asking about my -- asking
7 me about my availability to speak. There is -- actually it
8 says that Jim Troupis asked that I have you look at this
9 amendment. I was supposed to look into the amendment. It was
10 provided to me. I don't know if I requested it or not. It was
11 requested that it be sent to me.

12 Q Do you recall requesting information to be sent to you?

13 A If I was going to make an assessment, I would have to ask
14 for information. I don't recall asking for it, but --

15 Q Okay. Do you recall you were asking for the information
16 because you were being asked for your recommendations on what
17 essentially was a twin 57-57 district in AD 8 and 9?

18 A That's what's indicated here, and that is those are the
19 options that I was -- that information was -- I was requested
20 my opinion between those choices, yes.

21 Q And you were concerned at setting two districts below a
22 level set by the Court nine years ago, and by level, I mean the
23 Hispanic voting age population level; correct?

24 A Yes.

25 Q And you wanted to know what the number was as you made your

1 assessment; correct?

2 A Yes, yes, that's correct.

3 Q And you had no indication that you could have a district
4 that could perform based on having majority Hispanic voter
5 turnout; correct?

6 A Correct.

7 Q But you expressed the opinion that if they had -- if there
8 was strong community support to create two districts of this
9 sort and the community thought they could perform, then the
10 redistricting team could go either way; correct?

11 A Correct.

12 Q Dr. Gaddie, I'd like you to take a look at Exhibit No. 67,
13 please.

14 A Yes.

15 Q Actually this is an e-mail from you in the middle, the
16 middle e-mail. An e-mail from you to joeminocqua@msn.com. Do
17 you see that?

18 A Yes.

19 Q And that's Mr. Handrick; correct?

20 A Correct.

21 Q You were sending this on Wednesday, April 20, 2011?

22 A Yes.

23 Q You talk about running regression models on a number of
24 previous elections; correct?

25 A Yes.

1 Q And you refer in there to the expected -- I'm sorry -- they
2 expect GOP open seat Assembly vote -- I think that's supposed
3 to be "the"; correct?

4 A Yes.

5 Q GOP open seat Assembly vote using equations correlates at
6 .96 with a 2004-2010 composite and at a .93 level with a 2006
7 to 2010 state constitutional office composite. And you say
8 both of them are running a little strong relative to one
9 cluster of precincts. I'll look and see if they are up North.
10 Now, you're running a -- what would you call this analysis that
11 you were running?

12 A Well, this was an effort to build a partisanship index for
13 the legislative map. The -- one of the back checks that we
14 make sometimes in redistricting is on the shift in partisan
15 competition, and we sit here in litigation if -- if litigation
16 directed itself towards the issue of partisan performance or
17 partisan fairness, this is the type of information we would
18 have wanted to have explored and have available. Indeed, these
19 techniques described are very similar to what Professor Mayer
20 did in the trial in 2002.

21 Q And this was an effort to create a partisan normal vote
22 measure or baselining measure to use to apply to different
23 districts to ascertain their political tendency; correct?

24 A Yes.

25 Q And you were sending this to Mr. Handrick; correct?

1 A Yes.

2 MR. POLAND: No further questions.

3 JUDGE STADTMUELLER: Thank you. Mr. Kelly?

4 REDIRECT EXAMINATION

5 BY MR. KELLY:

6 Q Good afternoon, Dr. Gaddie.

7 A Good afternoon, Mr. Kelly.

8 Q One of the things that Mr. Poland was asking you about
9 earlier today was about a population equality amongst the
10 districts. Do you recall that?

11 A Yes.

12 Q And he was suggesting perhaps that the population deviation
13 in the districts in this map might be something less than he
14 would like to see. I'd like to ask you what your experience is
15 with respect to what courts find to be reasonable population
16 deviations. Do you have an opinion on that?

17 A Yes. First of all, there's no such thing as a de minimis
18 acceptable population deviation, but unlike congressional
19 district lines where the only standard -- the only -- the only
20 standard of population equality that cannot be challenged is
21 absolute equality, as equal as practicable is acceptable for
22 state legislative maps.

23 I've been involved in one piece of litigation that ever
24 challenged a map on the basis of population deviations, and
25 that was Larios v. Cox in the state of Georgia in '03, '04,

1 where the state of Georgia had crafted legislative districts
2 with a population deviation range approaching ten points with
3 two-thirds of the majority party seats being at plus four
4 points or above, approaching plus five -- excuse me, minus four
5 points or below approaching minus five, and with two-thirds of
6 the minority party seats being at a population range of four
7 points or more above the average. The Court threw out that map
8 because of the regional bias in the population deviations. The
9 overall range in that map was plus 9.98 percentage points.

10 Q Have you ever seen or are you aware of any Court that has
11 ever struck down a map for failure to get close enough to equal
12 population where the population deviation was below 9 percent?

13 A Not in my personal experience, no.

14 Q And how does the population equality in the Act 43 map
15 compare to that?

16 A Well, the range of population, as I noted previously, in the
17 two Act 43 maps are within a range of one point, which is an
18 order of magnitude smaller than what we had in Larios.

19 Q One of the other issues that Mr. Poland was talking with you
20 about was this question of citizenship voting age population.
21 Do you recall that?

22 A Yes.

23 Q Let me just walk back through the process of actually
24 drafting a map. When the -- when the staff were drafting this
25 map or engaged in that process, did they have citizenship

1 information in the set of data they were given by the Census
2 Bureau?

3 A No.

4 Q All right. Let's turn to Exhibit 63.

5 A Yes.

6 Q Mr. Polled highlighted several pieces of this, of this
7 document. These are notes that you made to yourself?

8 A Yes, these were my own reference notes.

9 Q And this isn't meant to be an expert analysis?

10 A No.

11 Q All right. The first line there says no configuration will
12 have enough Hispanic turnout to guarantee control of the
13 district based only on Hispanic votes. Do you see that?

14 A Yes.

15 Q All right. Do you -- is it your understanding that the
16 Voting Rights Act requires the Latino community to have a
17 guarantee they will control the district based only on Latino
18 votes?

19 A My understanding has always been the district should afford
20 an equal opportunity to elect.

21 Q And that's not the same thing as guarantee.

22 A No.

23 Q An equal opportunity is below a guarantee.

24 A Yes.

25 Q And it's an opportunity -- in other words, an opportunity

1 equal to any other group of voters.

2 A Yes.

3 Q Now, you continued on in that paragraph, the part that's not
4 highlighted.

5 A Yes.

6 Q It says that being said, there's ample evidence that white
7 crossover voting, that both districts should perform. Do you
8 see that?

9 A Yes.

10 Q Why do you say that?

11 A Well, because in developing the political performance
12 measures that were indicated in -- that were developed in the
13 regression equations and looking at political competition,
14 districts in that area had been heavily Democratic. In
15 District 8 we had had a Hispanic representative being elected
16 for over a decade. Democratic candidates winning there based
17 upon the low Hispanic turnout couldn't have been winning on
18 Hispanic votes only. There had to be crossover coming from
19 somewhere. The Hispanic turnout was just too low to create
20 those majorities by themselves.

21 Q All right. Let's go to Exhibit 73.

22 A Yes.

23 Q Can you tell me what that is?

24 A This is an e-mail from Tad Ottman to Jim Troupis, Adam
25 Foltz, Raymond Taffora, Eric McLeod and myself.

1 Q All right. Do you see in the second-to-last paragraph where
2 it says there was testimony?

3 A Yes.

4 Q Okay. It says there was testimony by two different Hispanic
5 groups in favor of the configuration in Amendment 2. Do you
6 see that?

7 A Yes.

8 Q Is Amendment 2 the configuration of Assembly Districts 8 and
9 9 that eventually were finalized in Act 43.

10 A That's my understanding, yes.

11 Q So that's the 60-54 percent Latino voting age population
12 district.

13 A Yes.

14 Q And you were told that there was testimony by two different
15 Hispanic groups?

16 A Yes.

17 Q Now, you had suggested that it would be good to have
18 community input to determine what's -- what map configuration
19 should be adopted for Assembly Districts 8 and 9; correct?

20 A Yes.

21 Q Does -- in the testimony that they're referring to here,
22 does that refer to testimony at the public hearing on Act 43?

23 A I suppose so, yes.

24 Q All right. Is testimony in a public hearing before the
25 legislature some indication of what the public might think?

1 A It is a form, yes.

2 Q And there are two Hispanic groups that testified in favor of
3 the way Act 43 configured with Assembly Districts 8 and 9?

4 A According to this e-mail, yes.

5 Q All right. Now, the next line is "No one that I'm aware of
6 testified in favor of either the bill configuration that we
7 have at 57-57," do you see there, "or in favor of Amendment 1,
8 which would have made a 64 percent Assembly District 8 and a
9 50 percent Assembly District 9." Do you see that?

10 A I see that, yes.

11 Q Now, that Amendment 1 would make the Assembly District 8
12 even higher Latino voting age population than what was
13 eventually adopted; is that correct?

14 A Yes.

15 Q And based on this e-mail, you don't have any information
16 that anyone in the community came out in support of that
17 amendment.

18 A Not based on this e-mail.

19 MR. KELLY: Thank you. Nothing further.

20 JUDGE STADTMUELLER: Mr. Poland?

21 MR. POLAND: Very quickly, your Honor. Thank you.

22 RECROSS-EXAMINATION

23 BY MR. POLAND:

24 Q Could I have Exhibit 63 back up, please. In paragraph 1,
25 the non-highlighted sentence, Dr. Gaddie, it states "That being

1 said, there is ample evidence with a white crossover voting
2 that both districts should perform." That was in the former
3 Assembly District 8 as configured under the 2002 Court-drawn
4 plan, not the new District 8 under Act 43; correct?

5 A Yes.

6 Q And then please turn to Exhibit 73 that was just up.
7 There's a reference to two different Hispanic groups that
8 testified in favor of the configuration or Amendment 2. Do you
9 see that?

10 A Yes.

11 Q Do you know what the groups -- what groups those were?

12 A No.

13 Q Do you know whether one was Hispanics for School Choice?

14 A I have no idea.

15 Q And do you know whether the second was not actually a group
16 but an individual, Manny Perez?

17 A I have no idea.

18 MR. POLAND: Nothing further.

19 FURTHER REDIRECT EXAMINATION

20 BY MR. KELLY:

21 Q Dr. Gaddie, do you recall what the Latino voting age
22 population in old Assembly District 8 was in comparison to
23 Latino voting age population in new Assembly District 8?

24 A The population in the old Assembly 8 is somewhat higher than
25 the new Assembly district, as I recall.

1 Q And in going back to using 2002 census data --

2 A Yes.

3 Q -- the old Assembly District 8 do you recall was 58 point
4 something percent Latino voting age population?

5 A Yes.

6 Q And under Act 43 Assembly District 8, Latino voting age
7 population was 60 percent.

8 A Just over I think 61 and a half, yes.

9 Q All right. So it's a couple percentage points higher under
10 Act 43 than it was back in 2002 under the old
11 Assembly District 8.

12 A Yes.

13 Q And was the old Assembly District 8 able to elect the
14 Hispanic community's candidate of choice?

15 A Yes.

16 Q How often had they done that?

17 A I believe starting in 1998.

18 Q And until?

19 A Continuing until today.

20 Q Has there ever -- since 1998 has there ever been to your
21 knowledge a non-Hispanic representative in Assembly District 8?

22 A Not to my knowledge.

23 MR. KELLY: Thank you.

24 JUDGE STADTMUELLER: Anything further, Mr. Earle,
25 Mr. Poland?

1 RE CROSS-EXAMINATION

2 BY MR. EARLE:

3 Q Your testimony just now was based on the old configuration
4 of Assembly District 8; correct?

5 A Yes.

6 Q You have no information as to how the Latino community would
7 perform electorally under the new configuration of Act 43;
8 isn't that correct?

9 A I have no analysis to indicate that, correct.

10 Q So none of your testimony about the old Assembly District 8
11 in response to Mr. Kelly's questions would apply to Act 43's
12 Assembly District 8.

13 A Not directly.

14 MR. EARLE: Thank you.

15 MR. KELLY: Your Honor, if I might ask one final
16 question.

17 JUDGE STADTMUELLER: Very good.

18 FURTHER REDIRECT EXAMINATION

19 BY MR. KELLY:

20 Q Dr. Gaddie, is it some indication of Assembly District 8's
21 ability to elect the Hispanic community's candidate of choice
22 that it was 58 percent Latino voting age population in 2002 and
23 it was able to perform and how would that relate to currently?24 A Yes, it is. The configuration of the district previously
25 had allowed the community to elect a representative of choice

1 under a lower Hispanic voting age population concentration than
2 the district's configuration at the end of the decade or the
3 reconfiguration in Act 43.

4 MR. KELLY: Thank you.

5 MR. EARLE: May I have one more Ping-Pong?

6 JUDGE STADTMUELLER: You may.

7 FURTHER RECROSS-EXAMINATION

8 BY MR. EARLE:

9 Q Professor Gaddie, that observation does not account for the
10 importation of a new significantly large group of high turnout
11 white voters from a different community, does it?

12 A I have no -- I have no testimony that has any bearing on
13 that, on that change, no. I have no analysis that has any
14 bearing on that change.

15 MR. EARLE: Thank you.

16 JUDGE STADTMUELLER: Very well. Thank you,
17 Dr. Gaddie. You may step down. You may call your next
18 witness.

19 MR. HODAN: Your Honor, the defense would call
20 Professor Grofman.

21 MS. LAZAR: Your Honor, just a note on scheduling.
22 We got a little bit slow in the morning, then caught up and got
23 a little bit ahead. We're still a little bit ahead but we have
24 technically scheduled a break to happen right about now. Can
25 we just adjourn that for a little bit and have break maybe at

1 3:00, 3:30?

2 JUDGE STADTMUELLER: Certainly.

3 MS. LAZAR: Thank you.

4 BERNARD GROFMAN, DEFENDANT WITNESS, DULY SWORN

5 THE CLERK: Mr. Grofman, would you please state and
6 spell your full name for the court reporter.

7 THE WITNESS: My full name is Bernard Grofman,
8 G-R-O-F as in Frank, M-A-N.

9 THE CLERK: Thank you.

10 DIRECT EXAMINATION

11 BY MR. HODAN:

12 Q Good afternoon, Dr. Grofman.

13 A Good afternoon.

14 Q You've testified in Wisconsin in redistricting cases in 1992
15 and 2002; is that right?

16 A Yes, I have.

17 Q Since it's getting late in the second day, I don't want to
18 waste --

19 A I'll just grab some water if I might. I apologize to the
20 Court and to you, but the transition from Southern California
21 to Wisconsin has given me a cold and a sore throat.

22 Q Dr. Grofman, you have a very distinguished career and
23 I don't want to waste a lot of the Court's time, but I would
24 like to spend just a little time discussing your background.
25 Could you briefly summarize the most important work you've done

1 in the past decade as an academic that's related to the issues
2 in this case.

3 A Probably the most important work that I have done that is
4 redistricting and voting rights related would be the book which
5 I am a co-editor of published by Oxford University Press on
6 redistricting in comparative perspective that looks at
7 redistricting practices in a dozen plus countries around the
8 world. I have also written two articles that have appeared in
9 Election Law Journal that deal with issues of how to measure
10 minority influence. These are articles that appeared shortly
11 after Georgia v. Ashcroft was decided by the U.S. Supreme
12 Court.

13 I've also written articles on the research methodology that
14 is relevant to voting rights determinations such as ecological
15 inference and ecological regression. I have written a number
16 of articles dealing with issues of electoral laws in different
17 countries, countries like France, Italy, Jap, Fiji, that deal
18 with the consequences of changes in election laws for
19 representation of various kinds.

20 Q Have you been the involved in litigation in the past decade
21 since your involvement as an expert witness in Wisconsin?

22 A No, I have actually not been directly involved in
23 litigation. I have, however, continued to be very actively
24 involved in issues that are related to redistricting. In
25 particular, I have served as a probably the senior consultant

1 to the specialist master for the Federal District Court,
2 Southern District of New York, in the drawing of congressional
3 district lines at a time when the governor and the branches of
4 the legislature of the state of New York were unable to agree
5 on a congressional plan.

6 In addition, I have served in a more minor role as a
7 consultant to the Federal District Court in Georgia in a case
8 which was the follow-up to Larios v. Cox where I was providing
9 testimony -- where I was providing consulting information about
10 minority vote dilution issues.

11 Q Have you submitted any amicus briefs to the Supreme Court?

12 A Yes. In the last decade I have been involved in the
13 preparation of amicus briefs for the United States Supreme
14 Court on major cases that deal with redistricting and voting
15 rights issues. These amicus briefs have been written with
16 other distinguished academics or law professors and they are
17 written to provide to the Court non-partisan guidance about
18 issues of measurement and concept definition in the areas
19 relating to voting rights and redistricting.

20 Q And were any of those briefs cited by the Supreme Court in
21 any cases?

22 A Yes. My memory is that in terms of briefs I've been cited
23 by the Supreme Court in one case, but, of course, in two of
24 those other cases my memory is that I've been cited by the
25 Supreme Court with respect to articles that I have written that

1 bear on the issues that the Court was considering in those
2 cases.

3 Q And was one of those cases Bartlett versus Strickland?

4 A Yes. In Bartlett versus Strickland, which was the case
5 where an amicus brief that I was the second author of with
6 Nathan Persily, who is at Columbia Law School as a professor in
7 the law school, there that brief, that amicus brief was,
8 in fact, cited by the U.S. Supreme Court. So there, if you do
9 a Lexus search for my name, you will have to look for it under
10 the variant spelling of et al.

11 Q I know in the past you've testified or been a consultant in
12 a number of cases outside of Wisconsin in addition to working
13 for courts. In the past have you done any work on behalf of
14 the U.S. Department of Justice?

15 A Yes. For at least two decades I was a fairly regular
16 consultant to the U.S. Department of Justice, primarily with
17 respect to Section 5 issues in the Voting Rights Act but also
18 in at least two cases with respect to Section 2 Voting Rights
19 Act issues.

20 Q Have you ever worked for a non-partisan redistricting
21 commission?

22 A Yes. In the city of New York I was the chief consultant
23 with respect to voting rights for the New York City
24 Redistricting Commission, which was a non-partisan
25 organization.

1 Q Have you ever consulted with minority groups?

2 A Yes, I have regularly consulted with a variety of minority
3 groups, perhaps most notably beginning with Thornburg versus
4 Gingles, where I was working for the NAACP Legal Defense and
5 Educational Fund. I have worked with the Mexican American
6 Legal Defense and Education Fund either directly or jointly
7 with cases in which they have been coplaintiffs with the U.S.
8 Department of Justice, probably most notably in Garza versus
9 County Board of Supervisors of Los Angeles. And I've been a
10 consultant to a variety of other civil rights groups in various
11 ways, including the Asian-American Legal Defense and
12 Educational Fund and the Southern Regional Council.

13 Q Doctor, have you worked for both Republicans and Democrats?

14 A Yes, I have, indeed, worked for both Republicans and
15 Democrats, though a perusal of the cases in which I have
16 testified revealed that, in fact, I have more often worked for
17 Republicans than Democrats.

18 Q Do you consider yourself a partisan expert or are you
19 considered that way by others?

20 A No. I -- it is fair to say that I both consider myself and
21 am considered by others as an academic, a non-partisan expert.
22 I am usual, I think it is fair to say, among experts who
23 testify in redistricting cases in that I have -- I was invited
24 to attend the secret strategy sessions of both Democratic Party
25 and Republican Party congressional committees in one previous

1 round of redistricting.

2 Q And where was that redistricting?

3 A Oh, that was at the national level. This was the Republican
4 National Committee and at Democratic National Committee
5 concerned with plotting -- I'll use the word "plotting" -- with
6 planning strategies for redistricting, and what I did in both
7 cases was to simply provide expert witness information about
8 the state of case law and expert witness testimony in -- on
9 redistricting and how it had changed over the years.

10 Q In this past year were you nominated by the Connecticut
11 legislature to do any work on its behalf?

12 A I was nominated by the leadership of both the Republicans
13 and the Democrats in Connecticut as one of two people who were
14 nominated by them to the State Supreme Court for the position
15 of special master in that state to be concerned with
16 congressional redistricting, and I was not chosen but I was,
17 indeed, deeply honored by having been one of the two people
18 nominated by both parties and the governor.

19 Q I know that you've been previously cited in a number of
20 other Supreme Court cases, most notably Thornburg versus
21 Gingles. Are there any other Supreme Court citations to your
22 work this decade?

23 A I think there is one additional citation to my work this
24 decade. So there are three cases, cases in which I submitted
25 amicus briefs in which my work is cited by the Court, either

1 the amicus itself or some other work of mine; and there is an
2 additional case, Georgia v. Ashcroft, in which my work is cited
3 by the Court.

4 Q And was that article that was cited there, is that relevant
5 to the issues in this case?

6 A Yes, very much so.

7 Q And why is that?

8 A That article, which is an article by myself as first author
9 along with a former student of mine and another faculty member.
10 That would be Grofman, Loveland, Hanley appearing in the
11 North Carolina Law Review in 2001, looks at new ways to think
12 about how we would measure the equal opportunity for minorities
13 to elect candidates of choice.

14 Q Dr. Grofman, have you written more than a couple hundred
15 articles and authored several books on redistricting?

16 A Well, I haven't written a couple hundred articles on
17 redistricting. I certainly have written a couple hundred
18 articles and I've written a fair number of books -- and edited,
19 I should say, a fair number of books that, in fact,
20 specifically deal with the topics of redistricting.

21 Q Are there any other particular honors or distinctions you've
22 received this decade that you wish to mention?

23 A Probably the most important for me personally would be that
24 in 2010 I received an honorary doctorate in political science
25 from the University of Copenhagen at a ceremony the queen

1 attended.

2 Q Dr. Grofman, switching gears, is Exhibit 1153 a copy of your
3 CV?

4 A Yes.

5 Q Did you prepare a rebuttal report in this case?

6 A Yes.

7 Q Is Exhibit 1181 a copy of your rebuttal report?

8 A Yes.

9 Q Is this report still accurate?

10 A Yes.

11 Q One last question before we move on to your testimony in
12 this case. Did you ever provide advice to anyone regarding the
13 creation of the maps in Act 43?

14 A No.

15 Q Doctor, there's been a lot of disagreement over the past
16 couple of days about whether the Latino community has an equal
17 opportunity to elect a candidate of choice in Assembly District
18 No. 8 under Act 43 in the upcoming 2012 elections and beyond,
19 and why don't we just cut right to the chase. You were in
20 Court this morning?

21 A Yes.

22 Q And you heard Professor Mayer testify?

23 A Yes.

24 Q And you heard him testify that in order to know whether the
25 Latino community could elect a candidate of its choice in

1 Assembly District 8, one needed to know whether the Latino
2 candidate would win the Democratic primary?

3 A Yes.

4 Q Do you share Dr. Mayer's opinion?

5 A Yes.

6 Q Why?

7 A In order to have an equal opportunity to elect, the minority
8 community must be able to either have a district which
9 effectively they control, that is, a district in which they
10 constitute a majority of the electorate, and that has been the
11 standard that had been used for most of the recent history of
12 the Voting Rights Act. That's a standard that one might call
13 effective voting equality. At least that is the name that I
14 gave it in a 1987 or so article.

15 At alternative way to answer the question as to whether a
16 minority group has an equal opportunity to elect a candidate of
17 choice is to ask whether the minority community is sufficiently
18 numerous such that given the reliable crossover votes of
19 individuals who are not members of that particular minority
20 community -- that might be other minorities, that might be
21 whites, in this instance it might be non-Hispanic whites --
22 whether or not that minority community, taking its voting
23 strength together with reliable crossover voting, has
24 sufficient strength to essentially ensure that minority
25 community an equal opportunity to elect candidates of its

1 choice.

2 Q Are you aware of any other voting rights cases where this
3 type of view about partisan primaries has been made by an
4 expert witness and accepted by a Court?

5 A Yes. The most important case here, one where there was
6 conflicting expert witness testimony with one expert arguing
7 for effective voting quality -- that is, the ability of the
8 minorities to be so large and numerous that they could control
9 the district on their own -- and two other expert witnesses
10 testifying that no, what was needed was a district in which
11 minorities could, together with reliable non-minority
12 crossover, elect candidates of choice.

13 The Court in Page v. Bartels in 2001 did, in fact, decide
14 that the testimony of the expert witnesses who were arguing for
15 a two-step process to determine the opportunity of minorities
16 to equally elect -- equal opportunity of minorities to elect a
17 candidate of choice, a two-step process involving a partisan
18 primary followed by a general election, that that two-step
19 process better reflected the realistic opportunity of
20 minorities to, in fact, have an opportunity to elect candidates
21 of choice.

22 Q And which side prevailed in Page v. Bartels?

23 A The side that was defending a plan which in four
24 instances -- sorry, three instances dramatically reduced the
25 African-American voting age populations in districts but in

1 which there was expert witness testimony that despite that
2 reduction in African-American voting age population in the
3 districts, the districts would nonetheless continue to elect
4 African-American candidates of choice thanks to the votes of
5 others, minority voters and others who would, in fact, reliably
6 support the African-American candidates of choice.

7 Q Now, before we go on to examine that two-stage test
8 involving a primary election and a general election, I want to
9 ask you some questions about elections in general. Doctor, if
10 a Hispanic candidate were to want to win a contested Democratic
11 primary, what would they have to do to win?

12 A Well, they would have to in a primary -- and I assume are we
13 talking about a partisan primary or a non-partisan primary?

14 Q Partisan primary.

15 A In a partisan primary they would have to have a majority, or
16 at least a plurality if it was a multi-candidate contest -- and
17 let's assume for simplicity a majority -- of the voters in the
18 Democratic primary, which would not, of course, be all the
19 voters in the district because not all the voters in any given
20 district are Democratic. Some of them would be Republican and
21 some of them might well be individuals who did not have a clear
22 partisan affiliation and did not participate in either the
23 Democratic or the Republican primary.

24 Q Doctor, do you have an opinion to a reasonable degree of
25 scientific certainty whether a Hispanic candidate can win the

1 Democrat primary in Assembly District 8 in the upcoming 2012
2 primary election?

3 A Yes, I do.

4 Q And what is your opinion?

5 A My opinion is that a Hispanic candidate can and will win the
6 Democratic primary in Assembly District 8 and that having done
7 so, essentially the winning of the Democratic primary in
8 Assembly District 8 is tantamount to election in the district.

9 Q What -- do you know who the incumbent is in
10 Assembly District 8?

11 A I believe that the name of the incumbent in that Assembly
12 district is JoCasta Zamarripa.

13 Q So we would have an incumbent running in
14 Assembly District 8?

15 A Yes.

16 Q What's the significance of that?

17 A In the political science literature there is absolutely no
18 disagreement that individuals who run with the advantage of
19 incumbency are greatly advantaged in elections. They are
20 advantaged in part because of name recognition. They are
21 advantaged in part because they may have an existing campaign
22 organization in place. They are advantaged because the very
23 fact that they are in the contest is likely or may have the
24 effect of deterring the stronger challengers.

25 So that while we can debate exactly the magnitude of the

1 incumbency advantage, there is absolutely no doubt that there
2 is such incumbency advantage, and it operates either to favor
3 or to disfavor minority candidates of choice. When the
4 minority candidate of choice is herself or himself an
5 incumbent, then incumbency advantage operates to benefit the
6 minority candidate. When incumbency advantage is found among a
7 candidate, found with a candidate who is not the minority
8 candidate of choice, that tends to have often a chilling effect
9 upon the ability of minorities to elect candidates of choice.

10 Q Do you have an opinion about whether the incumbent in
11 Assembly District 8 would receive any support from the
12 African-American community in the Democratic primary in 2012?

13 A I do not know of Assemblywoman Zamarripa's support from the
14 African-American community, but it is reasonable to generalize
15 from the support of the African-American community to a
16 previous incumbent in Assembly District 8 to see whether or not
17 in the African-American areas of Milwaukee there might,
18 in fact, be some level, indeed, perhaps some strong level of
19 support from African-American voters of the candidacy of a
20 Hispanic who was a clearly visible and viable and previous
21 Assembly district incumbent to win office.

22 MR. HODAN: Could you please put up Exhibit 1185.

23 BY MR. HODAN:

24 Q Doctor, I'm showing you the election results from a race
25 involving Pedro Colon versus Mr. Lipscomb with the election

1 results from that race. Do you see that?

2 A Yes. This is a documentary exhibit basically taken from
3 public data indicating ward by ward in the city of Milwaukee
4 what were the raw vote numbers for Mr. Colon and for
5 Mr. Lipscomb.

6 Q And what do you, in simple terms, take out of this exhibit?
7 What's the significance of this exhibit?

8 A Well, in the form in which the exhibit is presently before
9 me, the answer to that is not much because --

10 Q Could you please turn to the fourth page of the exhibit.

11 A Yes, thank you.

12 Q Does that help at all?

13 A It certainly clarifies the point of this exhibit, because
14 what the exhibit does is it shows in this case it would be
15 previous, that is, 2002 lines, the Senate District 4 and
16 Senate District 6, and I will simply note for the record that
17 Senate District 4 and Senate District 6 are overwhelmingly,
18 largely African-American districts.

19 And if we look at the total vote, and here we are including
20 some individuals who are voting who are not African-American
21 because this is not an entirely African-American district, but
22 in District 4 and District 6 combined, we see that Mr. Colon in
23 his candidacy receives the vote of 30,349 persons as compared
24 to only 17,407 for Mr. Lipscomb, and that means that when we do
25 the percentages by dividing the Colon vote by the total vote,

1 what we find is that Mr. Colon, in fact, receives a
2 63.6 percent vote from the voters in these heavily
3 African-American Senate districts.

4 Q What would the impact of having Republicans in Assembly
5 District 8 have on the incumbent's ability to win the
6 Democratic primary?

7 A Well, this is very interesting. This is, in fact, the topic
8 of the 2001 North Carolina Law Review that I am the principal
9 author of. Common sense would say that having Republicans in a
10 district hurts Democrats. Common sense would further say that
11 minority candidates, at least in Milwaukee, are Democrats.
12 That would lead to the apparent implication that having more
13 Republicans in a district would harm minorities, but to borrow
14 a phrase, that would be linear thinking.

15 That is to say, what actually is going to happen is that if
16 you have too many Republicans, that is going to be bad for the
17 minority community for the common sense reason that the
18 minority candidates are almost certainly going to be running,
19 if they're candidates of choice of the Hispanic community, as
20 Democrats. And if there are too many Republicans, the minority
21 candidate of choice is going to lose in a general election to a
22 Republican. That's the downside, but it's a two-step process.

23 The positive aspects of having numbers of Republicans in the
24 district is that those Republicans, presumably
25 disproportionately white -- because I can show that the

1 minority voters are disproportionately Democratic, so if there
2 are Republicans, they're going to be whites, non-Hispanic
3 whites -- that having those non-Hispanic white Republicans in
4 the district may actually operate if not to advantage, at least
5 not to disadvantage the minority community for the very simple
6 reason that those Republicans are not voting in the Democratic
7 primary.

8 MR. HODAN: Could you please put up Exhibit 1151.

9 BY MR. HODAN:

10 Q Doctor, Exhibit 1151 is a summary of the 2010 election
11 results for Districts 8 and 9 in a race involving now
12 Governor Walker and Mr. Barrett. Do you see that?

13 A Yes, I do.

14 Q And what is the significance of those election results with
15 respect to what you just testified about Republicans in
16 Districts 8 and 9?

17 A We know that the minority population percentages in, for
18 example, District 8 haven't changed that much, but we also know
19 that there has been from -- as evident from this chart, a
20 substantial change in the percent Democratic in old District 8,
21 old Assembly District 8 and in new Assembly District 8. That
22 is to say, old Assembly District 8 was 79 percent Democratic,
23 overwhelmingly strong Democratic district. New
24 Assembly District 8 is only -- only, I use the word
25 guardedly -- only 71 percent Democratic.

1 What this means is that the population, which is different
2 between the composition of old Senate -- old
3 Assembly District 8 and the population which is now found in
4 new Assembly District 8, has to have more Republicans in it
5 than it did before; and furthermore, since we know that the
6 minorities are not the, generally speaking, the voters who are
7 giving support to the Republicans, what this is telling us is
8 that we must have been adding to District 8 a non-trivial
9 number of non-Hispanic, non-other, non-minority, generally
10 speaking, white Republicans.

11 Q And does that make it more likely that the incumbent in
12 District 8 will win the Democratic primary?

13 A Certainly that has to be correct in terms of the Democratic
14 primary. If you subtract out non-Hispanic white voters from
15 the Democratic primary, then the proportion of Hispanics who
16 are within the Democratic primary relative to other groups is
17 only going to increase, all other things being equal.

18 Q Before we continue exploring your opinion about why you
19 believe a Hispanic candidate can win the Democratic primary,
20 I'd like to take a step back and perhaps you had a chance to
21 review the Act 43 maps as they relate to minority districts?

22 A Yes.

23 Q Could you give the Court sort of your big picture assessment
24 or observations of what happened with the minority districts in
25 Act 43.

1 A Well, as a professor I have one particular word that I would
2 use to characterize the way in which the legislature drew the
3 minority districts in 2011, and that word is plagiarism.

4 MR. HODAN: Could you please put up Dr. Grofman's
5 rebuttal report, Exhibits B and D, side by side, please. Maybe
6 if you could enlarge those just a little. Thank you.

7 BY MR. HODAN:

8 Q Dr. Grofman, what did you mean when you said plagiarize?

9 A I meant that essentially what it appears the legislature
10 did -- and I indicated appears because I have no personal
11 knowledge what actually the legislature or the members of the
12 legislature involved in redistricting were thinking, but based
13 on their effects by which they may be judged here, what they
14 did was they looked at the 2002 Court map and they said this
15 map must be constitutional. It was drawn by a federal district
16 court and so we are going to essentially copy the minority
17 population and voting age population percentages.

18 MR. EARLE: I object. I believe the witness at this
19 point is speculating. There is absolutely no foundation for
20 his belief at this point and I think he actually said so, so
21 I would object to the testimony.

22 JUDGE STADTMUELLER: The objection is noted.

23 BY MR. HODAN:

24 Q Please continue, Dr. Grofman.

25 A So if we look at the actual choices made by the legislature

1 and we compare those choices to the choices made by the 2002
2 Court confronted with a similar set of issues and actually
3 rather similar demography, because the minority districts in
4 2010 were underpopulated -- that was true for all of the
5 African-American districts and it was also true for
6 Assembly District 8 but not true for Assembly District 9 -- and
7 what you see basically is that in terms of black voting age
8 population, the proportion picked by the legislature was
9 roughly 60 percent, which is essentially comparable to the
10 average characteristics of the 2002 Court map or the
11 characteristics of the 2002 Court map in those districts which
12 were majority-minority voting age population.

13 And similarly, and here I do want to emphasize this point,
14 if you look at what the legislature actually did in drawing its
15 Hispanic districts, focusing on voting age population and
16 population, what we will see is that both with respect to
17 population and voting age population, the legislature drew
18 districts which were larger, more Hispanic than the districts
19 which were drawn in 2002 by the Court. In Assembly District 8
20 the Hispanic voting age population circa 2002 was 58.3 percent.
21 In 2011 in Act 43 the Hispanic voting age population in
22 Assembly District No. 8 was 60.52 percentage points.

23 And similarly we could also talk about Districts 12 and
24 District 9. These were districts which the 2002 Court drew as
25 minority influence districts. They were not claimed to be

1 districts which would realistically elect a minority candidate
2 of choice but they were districts in which minorities were said
3 to have potential influence.

4 If you compare Assembly District 12 drawn by the Court in
5 2002, it had a 32.77 percent African-American voting age
6 population. In contrast, if you look at 2011 legislative map,
7 Assembly District 12 has now gone up to become a 51.4,
8 51.5 percent African-American voting age majority district.
9 And similarly, if you look at Assembly District No. 9, which
10 was only 22.9 percent in 2002, you will see that that district
11 now has risen to a 54 percent, 54.03 percent Hispanic voting
12 age population district; that is, to say in voting age
13 population terms a majority Hispanic voting age population
14 district.

15 So if we take the 60 percent number for black voting age
16 population as a number which -- about which there is no dispute
17 that it provides minorities a realistic opportunity to elect
18 candidates of choice, then if we compare the 2002 plan to the
19 2011 plan, the 2002 plan had five clear opportunities to elect
20 districts for African-Americans at the Assembly district level
21 and the 2011 plan has five African-American clear majority
22 opportunities to elect districts.

23 Similarly, if we compare the 2002 Court map in terms of
24 Hispanic voting age population, if the district in 2002 at
25 58.34 percent elected a minority candidate of choice, then

1 potentially and perhaps even presumptively the district in
2 2011, which has an even higher Hispanic voting age population,
3 must be, at least presumptively, a district which has the
4 opportunity to elect a Hispanic candidate of choice that is,
5 in fact, higher in Hispanic voting age population and like what
6 happened in 2002, it has in place in the district a Hispanic
7 incumbent who can benefit from the advantages of incumbency in
8 a direction that favors the minority community.

9 Q Dr. Grofman, I'm going to read a short passage from the
10 opinion in 2002 that's on page 7 of this document, the sixth
11 paragraph down. I'm just going to read one line. This is what
12 the Court wrote about the minority districts in 2002. The
13 racial and cultural minority populations in these districts
14 appear sufficient to permit African-Americans and Latinos to
15 elect candidates of choice. Was the 2002 Court correct in its
16 assertion?

17 A Yes, it certainly was.

18 Q And why was that?

19 A Because if we look at the five black Assembly districts,
20 majority black Assembly districts, the two black
21 African-American majority Senate districts, those districts
22 elected, at the proportions that were drawn in the 2002 plan,
23 they elected African-Americans. Moreover, they elected
24 African-Americans in contests in which often there was not even
25 a general election challenge and in contests in which very

1 often, in fact, perhaps all the time but certainly often, that
2 the only candidates in the Democratic primary were
3 African-American candidates.

4 And if we turn to the Assembly District 8 as created in
5 2002, we see exactly the same pattern. The Court predicted,
6 projected, estimated this Latino district at a minority
7 population of only -- minority voting age population of only
8 about 58 percent.

9 MR. HODAN: Would you please put up 1181. Thank you.
10 Side by side. From Dr. Grofman's report. I apologize.

11 THE WITNESS: That the district as created in 2002 at
12 a minority voting age population of around 58 percent, that
13 that Hispanic voting age population with an incumbent in place
14 was enough for the minority community to have not just an
15 opportunity to elect a candidate of choice but essentially --
16 not quite a guarantee -- certainly a district which as minority
17 population grew over the course of the decade, elected a
18 minority incumbent, elected, reelected a minority incumbent,
19 and eventually in an open seat contest elected in a Democratic
20 primary in which the only candidates competing were Hispanic,
21 elected a Democratic primary winner as the winner of the
22 general election in District -- Assembly District 8.

23 BY MR. HODAN:

24 Q Dr. Grofman, you talked about plagiarism. Were there any
25 differences between the 2002 Court-drawn plan and the maps

1 passed by the legislature?

2 A The only real differences were slight improvements in the
3 Hispanic voting age population in Assembly District No. 8 and
4 dramatic improvements in the minority populations in
5 Assembly District 12, vis-a-vis African-Americans, and
6 Assembly District 9, vis-a-vis Hispanics. These were districts
7 which were clearly quite low circa 2002, which is the relevant
8 baseline, in terms of their minority voting age populations,
9 32.8 percent and 23 percent in the case of Assembly District 9.
10 Each of these districts has been transformed into a district
11 with a minority voting age population majority.

12 MR. HODAN: Your Honors, I'm about to turn to a new
13 subject. I note there was some mention of a break. Now would
14 be a good time if you'd like or I'm happy to continue.

15 JUDGE STADTMUELLER: We'll take a 15-minute break.
16 Resume at 3:20.

17 THE BAILIFF: All rise.

18 (A recess was taken.)

19 THE BAILIFF: All rise.

20 JUDGE STADTMUELLER: Mr. Hodan, you may continue with
21 the questions.

22 BY MR. HODAN:

23 Q Professor Grofman, with respect to Assembly District 8,
24 could you tell us what the combined minority population is?

25 A Yes. The combined minority population in that district is

1 77.2 percent. That is, by combined minority population I'm
2 referring to the Hispanic population plus the African-American
3 population, which would actually be the next largest minority
4 in the group, plus various other much smaller minority
5 populations, which together equal roughly ten percentage
6 points -- sorry, 12 percentage points of population.

7 Q What is the significance of that number with respect to your
8 opinion that a Hispanic candidate has an equal opportunity --
9 pardon me, that the Hispanic community has an equal opportunity
10 to elect a candidate of its choice?

11 A It is relevant in large part because there is reason to
12 believe at best that some non-Hispanic but minority voters are
13 prepared to vote for the Hispanic candidate, and here we have
14 the evidence from the African-American vote for Judge Colon.
15 But even if there were not a coalition core between
16 African-Americans and Hispanics, it is relevant because,
17 I think quite misleadingly and confusingly, the ways in which
18 we have been discussing the non-Hispanic population has
19 neglected the obvious point that not everyone who is
20 non-Hispanic is a non-Hispanic white. There are, in fact,
21 considerable non-trivial minority populations, primarily
22 African-American, that are also located in
23 Assembly District 12.

24 So if you, for example, only looked at Hispanic population
25 share or Hispanic voting age population share, you are

1 neglecting the fact that the non-Hispanic white voter is not
2 100 percent minus that number but rather a smaller number which
3 must be reduced to take into account the fact that some
4 proportion of the population, voting age population and, for
5 that matter, citizen voting age population is minority but
6 non-Hispanic.

7 Q I think you just accidentally used -- you mentioned
8 Assembly District 12.

9 A I'm sorry. I meant Assembly District 8, though I would also
10 say the same thing actually also applies to
11 Assembly District 12, but the numbers I gave were for
12 Assembly District 8.

13 Q Dr. Grofman, during the past few days we've heard testimony
14 from a number of the plaintiffs or at least the Voces
15 organization and others about apparent obstacles that would
16 prevent a Hispanic candidate from winning in new District 8 and
17 you were hear to listen to that testimony. Is that correct?

18 A Yes, I was.

19 Q And one of the first complaints appears to be that the
20 Hispanic citizen voting age population is too low in District 8
21 to allow the Hispanic community to elect a candidate of its
22 choice; is that correct?

23 A Yes.

24 Q And do you have an opinion with respect to that?

25 A Yes. My opinion is twofold. First of all, the real legal

1 significance of the claim that Hispanic citizen voting age
2 population is not large enough for the Hispanics to constitute
3 a clear majority of their own in the district is really an
4 issue to be determined on legal grounds by the Court. There is
5 no expert witness dispute that Assembly District 8 as presently
6 configured lacks a substantial enough minority population for
7 it in citizen voting age population terms, or terms of the
8 electorate as a whole, for it to constitute a majority.

9 If as a matter of law this Court were to decide that the
10 only way you can satisfy a Section 2 challenge is by
11 demonstrating that the proposed district which is proposed as a
12 remedy, or in this case defended as a remedy, is sufficiently
13 minority, that the minority constitute a majority of the actual
14 electorate, if that is the legal decision of this Court, then
15 plaintiffs win and it is no more complicated than that, because
16 there is absolutely no expert witness dispute that the
17 population numbers, the voting age population numbers and their
18 translation into citizen voting age is not such as to allow
19 Hispanics to essentially on their own control with the
20 guarantee the outcome of the district regardless of how anyone
21 else votes.

22 Q Now, given the minority population in District 8, do you
23 have an opinion about whether the percentages of the Hispanic
24 voting age population or citizen voting age population are
25 sufficient in District 8 to allow the Latino community to elect

1 a candidate of their choice?

2 A What we see from the data that is in front of us in this
3 exhibit is that the combined minority population in this
4 district is 77 percent. That number is higher than the
5 combined minority population was in 2002 in the district that
6 the Court drew.

7 If we look at the non-white -- sorry, at the non-Hispanic
8 white population, well, if the non-white population is going to
9 be 7717, the white population in the district is going to be
10 something like 23 percent of population. If we look even at
11 the white population, non-Hispanic white population, that rises
12 all the way up to 30 percent. So we're looking at a district
13 in which the non-Hispanic white population even when we're
14 looking at voting age population is 30 percent, and so the
15 issue becomes whether that non-Hispanic white population is
16 large enough to control the outcome of elections in this
17 district in a Democratic primary and then presumably in a
18 general election.

19 Q And do you have an opinion in that respect?

20 A Yes, I do.

21 Q And what is it?

22 A My opinion is based on the previous history of the district
23 and the evidence about the degree to which the population which
24 has been added to the district is a disproportionately
25 Republican population which will not be participating in the

1 Democratic primary, at least in elections where there is a
2 high-stakes Republican primary contest in which they might
3 vote. Under those circumstances this district has a realistic
4 opportunity for the Hispanic candidate to be elected, candidate
5 of choice to be elected.

6 This realistic opportunity for a Hispanic candidate of
7 choice to be elected is further enhanced by the simple fact
8 that there is a Hispanic incumbent in place, and it is further
9 enhanced by the undisputed testimony in the record that the
10 Hispanic and minority populations, but in particular the
11 Hispanic population, in this district is going to continue to
12 grow over the course of the decade. What that suggests to me
13 is that if there is any possible question about the ability of
14 minorities to elect, it is going to be in 2012, because the
15 minority population in this district is going to continue to
16 grow over the course of the decade.

17 But there is something quite important about 2012 in
18 addition even to the fact that there is a Hispanic incumbent
19 who presumably will be running for reelection. 2012 is a
20 presidential election year, and in a presidential election
21 year, while minority turnout may be lower than non-minority
22 turnout relative to its population, the incentives for
23 minorities to turn out and vote in a high-stakes election are
24 higher than in the kind of countywide, very, very low
25 visibility contests in which we have seen these abysmal levels

1 of minority turnout.

2 And while it remains true that minorities will not vote at
3 quite as high a rate relative to their population or even
4 voting age population as non-minorities, the ratio of turnout
5 in the minority community to the turnout in the non-minority
6 community is going to be much higher. We are not going to be
7 seeing in 2012 in a primary and in a general election the same
8 kinds of low levels of turnout that we have seen, or if we are
9 going to see those low levels of turnout in a primary election,
10 it will be because the only candidate in the contest is the
11 president incumbent.

12 Q I'd like to move to the second criticism that has been
13 leveled against Assembly District 8, and that is that somehow
14 its geographic configuration will prevent the incumbent from
15 winning the Democratic primary. Do you believe the new
16 configuration will prevent the incumbent from winning the
17 Democratic primary?

18 A No, I do not for the reasons that I have identified, that
19 the district remains more heavily Hispanic than it was in 2002,
20 more heavily minority, combined minority than it was in 2002,
21 and to the extent that there has been change in the composition
22 of the white -- non-Hispanic whites in the district, and there
23 has been, that change is essentially to bring in high turnout
24 Republicans into the district.

25 MR. HODAN: Could you please put up Exhibit 1189.

1 BY MR. HODAN:

2 Q Dr. Grofman, you were in Court when the executive director
3 of Voces testified yesterday?

4 A Yes, I was.

5 Q And you heard Miss Neumann-Ortiz testify about the
6 Aldermanic Districts 8 and 12 for the city of Milwaukee?

7 A Yes.

8 Q I'm showing you Exhibit 1189 and that is an aldermanic --

9 A An overlay.

10 Q An overlay. Why don't we go to Exhibit 1190 first. Thank
11 you for pointing that out, Dr. Grofman. Exhibit 1190 is the
12 current configuration of the Milwaukee Aldermanic districts 8
13 and 12?

14 A Yes. These are the aldermanic districts for the Milwaukee
15 city council.

16 Q And you hired the executive director of Voces testimony
17 about how they worked very hard to get these maps in place and
18 that they were very happy about it and they felt that they were
19 successful?

20 A Yes, I heard that testimony.

21 Q What's the significance of that testimony to your analysis?

22 A Well, one of the arguments that was raised was that it was
23 improper to divide the -- what I will call for want of a better
24 word, the older Hispanic community, which was the community
25 located in old -- in old, that is, 2002, Assembly District 8,

1 into pieces, two pieces, one of which would go into new
2 Assembly District 8 and one of which would go into new
3 Assembly District 9. And then in particular there was a
4 problem with drawing a north-south line, splitting the Hispanic
5 districts AD 8 and AD 9 rather than having those districts
6 basically being one on top of the other.

7 What we see in Exhibit 1190 is that the line that splits
8 Assembly District 12 -- sorry, Aldermanic 12, which corresponds
9 to Assembly District 8 and Aldermanic District 8, which
10 corresponds to Assembly District 9, that line is a line that
11 runs north and south. It is a line that splits old
12 Assembly District 8 in a north-south fashion and this is a
13 configuration which the Voces plaintiffs in their testimony in
14 front of the Milwaukee city council apparently had no trouble
15 with.

16 Q Is there anything else to be learned from the testimony of
17 Miss Neumann-Ortiz? And I ask you to put up Exhibit 1189.

18 A Exhibit 1189 was prepared at my direction to deal with the
19 question of what would happen if we began with Aldermanic
20 District 12 and Aldermanic District 8 in place, which, of
21 course, is not the actual sequence that occurred; but if we
22 were to begin with these two districts, what would we do in
23 order to go from an aldermanic district, which is, I believe,
24 about 40,000, to an Assembly district which is over 57,000. So
25 you have to find additional people to put into these aldermanic

1 districts in order to make them large enough to constitute an
2 Assembly district that was equal populous.

3 And here this is, the red areas, the darker red areas show
4 areas which are just barely, 50 percent and up. They're
5 actually higher than 50 percent. They're simply 50 percent and
6 up in terms of their proportion of I believe it is Hispanic
7 population. It might be voting age and I apologize. I don't
8 remember because the exhibit right now is not labeled. The
9 orange areas are areas which are substantial but not 50 percent
10 or over Hispanic population.

11 So when we look at the configuration, and imagine that we
12 began with essentially Aldermanic Ward 12 and we had to find
13 additional population to configure it, to make it equal
14 populous were other Assembly districts, there are four choices.
15 We could go east but that would put us into white areas. We
16 could go west but if you will notice -- and I'm sorry, I don't
17 want to touch the screen and have a repetition of things that
18 I've seen before -- if you look at the little orange piece over
19 to the left, you might think you would want to go west in order
20 to pick up that little piece of more Hispanic geography but it
21 turns out that particular piece of geography, at least so I am
22 told, is located in West Milwaukee as opposed to just ordinary
23 Milwaukee. So you don't really want to go west, because again,
24 you're dealing with areas that are much lower in Hispanic
25 population. You don't clearly want to go east and if you go

1 north you're running into the black areas.

2 Therefore it sort of logically follows if you are drawing
3 the district that you are going to go south, young man. And
4 when you do that, you see that you pick up both in new
5 Assembly District 8 and in new Assembly District 9 substantial
6 pockets of Hispanic population.

7 Now, those pockets in the orange areas are not usually as
8 heavily Hispanic as the areas that were in old
9 Assembly District 8, but they are sufficiently Hispanic so that
10 the population in old -- in new Assembly District 8 exceeds --
11 the Hispanic population exceeds the Hispanic population as it
12 existed in old Assembly District 8, that is, the 2002 plan. So
13 that these districts are relatively heavily Hispanic districts.
14 Eight, as we have talked about before, is 65.9 percent Hispanic
15 in population, 60.5 percent Hispanic in voting age population.
16 And District 9, which is sort of the -- what I refer to as the
17 missing link in the discussion of what actually is happening
18 with respect to minority vote dilution issues in this state,
19 that district is 60.5 percent Hispanic population and
20 54 percent Hispanic voting age population.

21 So if you were -- and I am someone who has drawn maps for
22 courts in areas of heavy minority population -- if you were to
23 look at this configuration beginning with the most heavily
24 Hispanic areas, if there is no apparent problem with drawing a
25 north-south line, because the Voces plaintiffs themselves drew

1 a north-south line distinguishing AD -- sorry, Aldermanic
2 District 8 from Aldermanic District 12, then this is a
3 perfectly reasonable way to configure two, and I emphasize two,
4 Hispanic voting age population districts.

5 Q Professor Grofman, there was testimony from the Voces
6 plaintiffs that by dividing Districts 8 and 9 along 16th Street
7 that the business district was divided. Are there some
8 advantages to the Hispanic community where there's a
9 possibility of two Hispanic seats to have a divided business
10 district?

11 A Well, I don't of my own knowledge know exactly where the
12 Hispanic business community is located. Taking the idea that
13 it is located along 16th Street, the advantage, potential
14 advantage for long-run minority opportunity to elect candidates
15 of choice over the course of this decade is to take that
16 business area and place a portion of it in the district which
17 already has a Hispanic incumbent and to place a portion of it
18 in the district which has the potential to have a Hispanic
19 candidate of choice elected sometime over the course of the
20 decade.

21 If I may, let me just indicate what I as someone who has
22 drawn plans for minorities would say about the choices that the
23 legislature had to make. I have no way of knowing how they
24 chose but I certainly can identify the choices or the choice
25 that they had to make. That choice is really quite simple.

1 Either they could do as the Voces plaintiffs want them to do,
2 which is to draw a super majority district in
3 Assembly District 8, a district which already elects a Hispanic
4 candidate of choice, and then take the population, Hispanic
5 population which would have gone into Assembly District 9 and
6 put it in 8.

7 My view is as I testified in my declaration is that that is,
8 from my standpoint as an expert, a bad idea for the Hispanic
9 community, because what it does is it delays the time at which
10 it would be possible to elect a second Hispanic candidate of
11 choice from what is now admittedly only an opportunity
12 district, namely Assembly District 9.

13 Q Dr. Grofman, a third complaint that has been leveled against
14 Assembly District 8 is that it was drawn in such a way that
15 there were new white voters from District 9 and that these new
16 voters have come in and that they have higher turnout rates;
17 therefore that will jeopardize the ability of the incumbent to
18 win in the next primary or next election. Do you have an
19 opinion about whether that infusion will have that effect?

20 A Yes. My opinion is that it will not have that effect.

21 Q And why is that?

22 A Let me step back a moment. We have heard testimony about
23 the inability of now Judge Colon to win an election in the new
24 portion of Assembly District 8, a portion of that district that
25 comes from old Assembly District 9. And that contest which he

1 lost in the new portion of the district, the portion that comes
2 from old Assembly District 9, did not, in fact, vote for him,
3 but the contest that we were talking about is a contest in
4 which there was a long-standing incumbent contesting the
5 contest. And we know one very important fact about
6 Judge Colon. He is not a Republican. He, in fact, was elected
7 from Aldermanic 8 as a Democrat, winning the Democratic primary
8 and going on to win the general election several times.

9 Q You meant Assembly District 8.

10 A Assembly District 8. Sorry. The reason that that's
11 important is that it is undisputed, at least in my view, that
12 there are more Republicans from the portion of new District 8,
13 the district that's just been created, coming from old
14 District 9 than there are Republicans coming from old
15 District 8 and the portion of old District 8, the 2002
16 district, that remains in new District 8.

17 If Colon, Judge Colon is recognizable as a Democrat, it is
18 not so surprising that he will not do well in the portions of
19 old district -- sorry, of old District 9 that are now in new
20 District 8 and he was running against an incumbent.

21 I was in honesty surprised to see this contest. I had not
22 seen this contest explored by plaintiffs' expert before, even
23 though there were two different polarization analyses that were
24 conducted, one in Dr. Mayer's first declaration and another
25 that was provided as -- along with his deposition, and it

1 seemed to me since the Colon contest in 2011 where Judge Colon
2 sought election -- actually reelection since I believe he was
3 appointed to the bench -- sought reelection as a judge in the
4 2011 Circuit Court election, somehow it seemed to me strange
5 that I didn't see analysis of that district since it was
6 found -- analysis of that district was found or that contest
7 was found in both Exhibit 7 in Dr. Mayer's original report and
8 also in Exhibit 134 and then subsequently I believe 1089, just
9 renamed the exhibit, renaming these various exhibits from one
10 deposition to Court.

11 I don't know why we didn't see this analysis of Colon's
12 contest for the Circuit Court, but it seemed to me that the
13 Court, this Court ought to see that analysis, and so I
14 requested that counsel do it. I say I requested of counsel
15 that they provide sufficient staff assistance to allow me to
16 conduct this analysis.

17 MR. HODAN: Could you please put up Exhibit 1186.

18 BY MR. HODAN:

19 Q Professor Grofman, this is a document that shows the
20 election result in the race between Pedro Colon and Christopher
21 Lipscomb in the 2011 spring election for Milwaukee County
22 Circuit Court judge?

23 A Yes.

24 Q Okay. And on it it indicates the results in wards from old
25 8 that were entirely within -- or I should say that are

1 entirely within new 8 and wards from other seats that are not
2 entirely within new 8. Could you tell us the significance of
3 these election results with respect to your opinion in this
4 case?

5 A As I would expect in a non-partisan contest, the support for
6 Judge Colon from the wards that are now entirely in the new
7 Assembly District 8 is lower than it is in his old
8 Assembly District 8, a district which he represented for a
9 long, long time as an incumbent.

10 But nonetheless, even in these wards that have been
11 imported, if you will, from Assembly District 9 that are
12 essentially part of the extension of Assembly District 8
13 southward toward the areas of greatest growing Hispanic
14 population strength, even these wards elected Mr. Colon. And
15 when we combine the vote from the old wards that were
16 previously in the previous District 8 with the new wards, it is
17 clear that not only does Mr. Colon win but he wins his
18 judgeship by a fairly comfortable margin.

19 And this I repeat is a non-partisan contest in which the
20 Republicans in the portion of old district, Assembly District 9
21 who are now in new Assembly District 8 are, in fact,
22 participating in the election.

23 MR. HODAN: Dr. Grofman, I'd like to switch gears a
24 little. Could you please put up Exhibit 1025.

25 MR. EARLE: Your Honor, may I interrupt for a moment?

1 This is something we saw for the first time last night and it's
2 essentially new work, and so we would request that at the end
3 of this examination that we be allowed to bring Dr. Mayer back
4 up on the stand to respond to this. This came over the e-mail
5 last night, I think at midnight.

6 JUDGE STADTMUELLER: I thought you were going to say
7 over the transom at midnight.

8 JUDGE WOOD: The metaphorical transom.

9 JUDGE STADTMUELLER: We'll address it then. You may
10 continue, Mr. Hodan.

11 BY MR. HODAN:

12 Q You were hear in Court when Dr. Mayer talked about his
13 polarization study?

14 A Yes.

15 Q And you heard that he testified that his polarization
16 studies would not be helpful in predicting whether a Latino
17 candidate could win the Democratic primary in
18 Assembly District 8?

19 A Yes.

20 Q Do you share this view?

21 A Yes. As I have previously testified, these are without
22 exception non-partisan, relatively low visibility contests.
23 Even I think the Aldermanic 12 election is -- would probably
24 count as a low visibility contest, and they are held without a
25 partisan cube because they are non-partisan and they are held

1 off the election cycle, which is the cycle for partisan
2 election also which motivates voters, both minority and
3 non-minority, to go to the polls.

4 Q Dr. Grofman, do you have an opinion about what the best
5 evidence is to use, the best races to look at in order to
6 determine the racial polarization in an Assembly district?

7 A Yes, I do.

8 Q And what is that opinion?

9 A That opinion is the best evidence is evidence that embodies
10 three elements. The first element is that there is, in fact, a
11 minority candidate who is contesting. The second element is
12 that it is an election of the same type as that which is at
13 issue, vis-a-vis Voting Rights Act violation here in Assembly
14 district or at least similar in nature, such as, for example, a
15 Senate district election. And the third aspect is that if an
16 election is going to be taking place within a given population,
17 then it is appropriate to look at elections which are, in fact,
18 looking at the behavior of voters within the jurisdiction where
19 the voting rights challenge is taking place.

20 Q And taking each one of those three elements, does
21 Dr. Mayer's polarization study as represented in Exhibit 1025
22 meet any of those elements?

23 A It does include the projection of countywide or in one case
24 aldermanic district elections into the population that is found
25 in new district -- new Assembly District 8 and new

1 Assembly District 9, which desirable, but that is only one
2 aspect of what the best evidence must consist of. It appears
3 to have another element of best evidence, and I say it appears
4 for reasons I'll make clear in a moment, because it has
5 candidates who have Hispanic surnames who are contesting, and
6 that, indeed, is one of the three elements that I identified.

7 The element that is lacking is that these are all
8 non-partisan, low-intensity, off-the-election-cycle contests,
9 and therefore I give very little weight to these elections.
10 Nonetheless, they are informative of some aspects of voting
11 behavior of the Hispanic community.

12 Q And how are they informative with respect to cohesion of the
13 Hispanic community?

14 A Well, before I do that, it's important for me to identify
15 for the Court how it is that what is apparently seven contests
16 actually become three contests.

17 Q Could you please explain that to the Court.

18 A The state superintendent contest has a candidate in it whose
19 name is Fernandez. By stipulation, though that candidate has a
20 Hispanic surname, that candidate is not, in fact, a person of
21 Spanish heritage or does not so identify himself or herself as
22 a person of Spanish heritage. The county supervisor race,
23 which Dr. Mayer yesterday indicated he no longer wished to
24 consider, is because the candidate who is listed under the name
25 Peggy West, not a Hispanic surname candidate, is by agreement,

1 by stipulation effectively, in fact, a Hispanic candidate.

2 So therefore what we have in the county supervisor contest
3 is a contest between a Spanish surname candidate who is
4 actually Hispanic and a non-Spanish surname candidate who is
5 also Hispanic. It therefore logically follows, since bot
6 candidate are Hispanic, that a Hispanic is going to win, and
7 that is, indeed, what happened in this election.

8 And I'm going to mention the actual data for each of these
9 four elections even though Dr. Mayer dismissed those elections,
10 if for no other reason than if we -- because if we dismiss
11 those four elections, we're left with all the evidence
12 presented by Dr. Mayer about polarization and cohesion,
13 essentially three contests in this exhibit, one contest that is
14 not in this exhibit that was in his Exhibit No. 7, which is a
15 contest that does not take place actually in this Hispanic
16 population area but is an Assembly district contest elsewhere,
17 though involving a Hispanic candidate, and then the analysis
18 that was presented of Judge Colon's contest for city attorney.
19 And that would be the only evidence that would have been
20 presented by Dr. Mayer about either cohesiveness or racially
21 polarized voting.

22 Q And what would that evidence tell us about whether the
23 plaintiffs have satisfied prong two of Gingles to show that the
24 Hispanic community is cohesive?

25 A If I may ask you to turn to the next page of this exhibit.

1 Unfortunately it's very confusing. If you can show both pages
2 on the same screen, that will make it easier for the Court and
3 for me to follow. And could you blow it up just a little bit
4 if you can.

5 I wish to call your and the Court's attention to the second
6 page of Dr. Mayer's exhibit and to the second column of the
7 second page. And I apologize that in order for me to be able
8 to identify which contest we are talking about, I have to show
9 this on the screen in a way that makes it very, very difficult
10 even for me right in front of it to read the text, but I assume
11 the Court has its own exhibits. They can look directly at hard
12 copy.

13 If I turn the Court's attention to the second column, which
14 is called -- which would be called Hispanic vote for the
15 Hispanic candidate. That would be the correct column labeling.

16 Q And Dr. Grofman, we're talking about Exhibit 1025.

17 A Yes, we're talking about Exhibit 1025.

18 Q Please continue.

19 A So the second column is an estimate of the Hispanic vote for
20 the Hispanic candidate in the area that encompasses the present
21 Assembly District 8 and the present Assembly District 9. And I
22 see that the Court is getting hard copy out, so I will wait
23 until this they've had an opportunity to get hard copy before I
24 continue.

25 Turning to the second column of the second page of

1 Exhibit 1025 from Dr. Mayer, what that shows is the level of
2 support from the minority community to the minority candidate.
3 Now, it is a truism in political science that you cannot win
4 elections unless you have the support of the community from
5 which your natural supporters would come. If we look at the
6 numbers here, what we see is that with the notable exception of
7 Judge Colon's two contests where he is first running in a
8 primary for Circuit Court and then running in a general
9 election for Circuit Court, that would be the sixth and seventh
10 lines, the numbers .548 and .644, if we look at the other five
11 contests, the five contests in which minorities lost, a
12 Hispanic candidate lost -- arguably in each of those contests
13 the Hispanic surname candidate lost in each of these
14 contests -- what do we see?

15 Well, essentially we see that in none of these contests is
16 it the case that we can be confident that the Hispanic
17 candidate got a majority of the Hispanic vote. The way in
18 which we know that is by looking at the first item in the
19 brackets, which is a lower bound estimate for the Hispanic
20 share of the Hispanic vote, and what we see is the Hispanic
21 candidate could have gotten 49 percent, 46 percent, 48 percent,
22 49 percent and then in the seventh line 43 percent, as low as,
23 otherwise known as less than, 50 percent.

24 To the usual level of political science confidence, the
25 95 percent confidence limit or the two standard deviation

1 confidence limit, we cannot be certain that the Hispanic
2 candidate got a majority of the Hispanic vote. Forget the
3 non-Hispanic vote. We cannot even be certain that the Hispanic
4 candidate got a majority of the Hispanic vote.

5 The best analogy I can give the Court would be for a
6 presidential election poll where there are two candidates
7 contesting for president. We might observe that one of them
8 seems to have gotten more votes than the other but within the
9 margin of error we can't really be sure, and such an election
10 contest would normally be called by pollsters too close to
11 call. And effectively in five of these seven contests with
12 Spanish surname candidates, the level of minority, that is,
13 Hispanic, cohesion for the minority candidate is essentially
14 50 percent.

15 An equally more or a more common sense way to think about
16 this is to say, well, forget about statistical estimates, just
17 add up -- or confidence limits, simply add up the best
18 estimate. So the best estimate is going to be 52 percent, 50
19 percent, 49.8 percent, 50.5 percent, and 46.9 percent in the
20 seventh column. So there are five numbers there in those five
21 elections where a minority candidate loses.

22 And what we discover when we do that, if I did my arithmetic
23 correctly, is the average level of minority support for the
24 minority candidate is something like 50.05 percent, or in other
25 words essentially there is no minority candidate in these

1 contests. And if there is no minority candidate in these
2 contests, meaning the candidate who receives a clear majority
3 of the minority vote, then it's also impossible to conclude
4 that voting is racially polarized, because for voting to be
5 racially polarized according to Thornburg versus Gingles, the
6 candidate in the race must not merely be a minority. The
7 candidate in the race must be the minority candidate of choice,
8 where candidate of choice is a candidate who receives from the
9 minority community majority support.

10 So we have essentially no evidence for these five contests
11 where minorities lost that there is minority cohesion, and in
12 the two contests for which there is evidence for minority
13 political cohesion, we know that the minority candidate won,
14 which is to say that if we look now not to prong two of the
15 Thornburg versus Gingles test but to prong three of the
16 Thornburg versus Gingles test, that a minority candidate of
17 choice must usually, regularly lose from these seven contests.

18 There only are two where there is a minority candidate of
19 choice whose success or failure could be evaluated, and in
20 those two the minority candidate of choice actually wins. So
21 that clearly does not demonstrate under prong three of
22 Thornburg versus Gingles that a minority candidate regularly
23 loses. And even if we go back to earlier analyses offered by
24 Dr. Mayer, if we turn, for example, to Exhibit 7 in Dr. Mayer's
25 original deposition, if I can find -- perhaps that might be --

1 if we can call that up --

2 Q Dr. Mayer's first report, 1071, please. 1072.

3 A Exhibit 1017 and Exhibit 7. It should be at the back.

4 MR. HODAN: If you could go to the back of that.
5 Thank you. And maybe blow that up just a little. Thanks.

6 THE WITNESS: There are five contests that are shown
7 in Exhibit 7, that's Dr. Mayer's original declaration, and four
8 of these are also found in Exhibit 1025, which we have
9 previously looked at. One of them, the 2004 State Senate
10 District 8, in fact, is not located within the minority area.
11 That actually, even though the candidate is a Hispanic
12 candidate, the district is a district with a very, very, very
13 low percentage of Hispanic voters.

14 Of these five contests, Colon, Judge Colon wins in
15 his 2011 Circuit Court primary, entering a general election.
16 He wins in the general, and Rose Fernandez, who is a Hispanic
17 surname candidate but not actually Hispanic, wins in the
18 primary but not in the general election for the state
19 superintendent of public instruction.

20 But I want to call the Court's attention to the
21 numbers, because if we believe those numbers, there is
22 something quite important to be said, and that is if, for
23 example, state superintendent of public instruction
24 Rose Fernandez is receiving 40 percent of the support of the
25 non-Hispanic voters and 95.7 percent of the support of the

1 Latino voters -- which is a different estimate than shown in
2 the other exhibit but let's use this one for the moment -- if
3 that were the case and you put her in present
4 Assembly District 8 with 40 percent of the vote from the
5 non-Latinos and 95.7 percent of the vote from the Latinos,
6 essentially she is going to win an election in
7 Assembly District 8.

8 And similarly, if we look at 2004 State
9 Senate District -- sorry, State Senate District 8 and the
10 Jennifer Morales/Alberta Darling contest, using Dr. Mayer's
11 estimates, 89.2 percent Hispanic support for the Hispanic
12 candidate, overwhelming support, and 49.6 percent non-Latino
13 support for the Hispanic candidate, it does not take a degree
14 in mathematics to realize that a candidate who is getting
15 49.6 percent estimated support from the non-minorities will,
16 with any level of support from any reasonably substantial
17 minority community, in fact, be the winner.

18 And the reason that Jennifer Morales is not the
19 winner in State Senate District No. 8 is there are almost no
20 Hispanics there. She's losing barely in the non-Hispanic white
21 community, non-Hispanic community, but even her incredibly high
22 levels of support from the Hispanic community are not enough in
23 a district with almost no minorities for her to win.

24 But Assembly District 8 is not a district with no
25 minorities. We can argue about exactly what percentage

1 minorities will constitute of this district and its electorate
2 in the general election or in a Democratic primary, but simply
3 using Dr. Mayer's numbers, it's very clear from those numbers,
4 that essentially what he is doing through his exhibits, if not
5 through his testimony, is to say that in the new
6 Assembly District 8 a minority candidate can win. And that's
7 before we take out the non-Hispanic white Republicans. Here
8 they've already been taken out because in Senate -- State
9 Senate District 8, presumably many of the people voting against
10 are Republicans.

11 But in any case, even using these numbers, it seems
12 essentially not a matter of argument that a minority could win.
13 So we have polarization analysis that shows that Pedro Colon
14 wins, which we know, and he wins even though barely in the part
15 of the district that was in old Assembly District 9 but he wins
16 overall quite easily; and if we use the 2004 state Senate
17 district race with an 89.2 percent Hispanic cohesion and a
18 49.6 percent crossover, once again the Hispanic candidate wins
19 in present as new Assembly District 8.

20 So for all the reasons that I have identified, you
21 either -- you either believe that Hispanics have no cohesion,
22 which is what Exhibit 1025 seems to suggest, in which case
23 there are no Hispanic candidates of choice and JoCasta
24 Zamarripa is a mirage, because the data in this exhibit, in
25 Exhibit 1025, suggests that if this were true, there is no way

1 for a Hispanic to win even old Assembly District 8, much less
2 new Assembly District 8. But, in fact, Assemblywoman Zamarripa
3 is not a mirage. She is a Hispanic who has been elected and
4 who, I believe, based on the kinds of evidence that Dr. Mayer
5 has presented, will, in fact, be reelected in a Democratic
6 primary where there are fewer white voters because of white
7 Republicans being in the district and she will then go on --
8 and I can go back to an earlier exhibit -- she will then go on
9 to win the election, the general election in the district with
10 71 percent of the vote, assuming she has an opponent.

11 If we look at the previous history of old
12 Assembly District 8, the Hispanic candidate who wins that
13 district, first Judge Colon and now Ms. Zamarripa, have only
14 rarely ever had a Republican opponent. In the one instance
15 where there was a Republican -- actually not a Republican -- an
16 independent opponent to the winner of the Democratic primary,
17 that person was himself Hispanic and that person electorally
18 got buried. That is to say, the winner of the Democratic
19 primary received, as I recall, 87 percent of the vote in the
20 general election.

21 And while I will admit quite cheerfully that the
22 winner of the Democratic primary in the new Assembly District 8
23 might only get 73 percent of the vote in the general election
24 as opposed to 83 percent of the vote in the general election, I
25 do not believe that that in any way changes the calculus as to

1 how likely it is that the winner of the Democratic primary in
2 Assembly District 8 will, in fact, go on to win the general
3 election.

4 BY MR. HODAN:

5 Q Dr. Grofman, aside from your critique of the polarization
6 study and the cohesion in this exhibit, do you have any
7 opinions with respect to the testimony that Dr. Mayer has given
8 with respect to turnout?

9 A Dr. Mayer's testimony is twofold. If you look at
10 Exhibit 1025, and here, if I may, I would like to call the
11 Court's attention to the first page of Exhibit 1025, and
12 I would call the Court's attention to column three -- I'm
13 sorry, let me look again -- to column 5 and to column 7.
14 Column 5 reflects the proportion of minorities of voting age
15 population who are estimated to have voted in the contest, and
16 column 7 shows the proportion of non-minorities who are
17 estimated to have voted in the election relative to their
18 voting age population. So the denominator is voting age
19 population, the fraction of voting age population that actually
20 participated in this particular contest showing up at the
21 polls.

22 As Dr. Mayer himself demonstrated, the levels of minority
23 turnout relative to the level of the non-minority turnout are
24 abysmal in these non-partisan, mostly countywide contests. The
25 way to see that is to take the number that is shown in the

1 fifth column and compare it to the number that is shown in the
2 seventh column. So, for example, 6.3 percent turnout among
3 minorities, Hispanic; 16.7 percent turnout, roughly three to
4 one; 7.7 versus 21.4, again roughly three to one; .23 versus
5 .57, little bit more like two and a half to one; .25 to .109,
6 four to one; .25 to .117, again, almost five to one; .03 to
7 .298, that's roughly ten-to-one levels of minority turnout,
8 lower than one-tenth the size of non-minority turnout; 17.2 to
9 0.5.

10 If you believe those numbers, and I am prepared to believe
11 them, they would seem to say that no Hispanic candidate could
12 possibly win in old Assembly District No. 8 because the levels
13 of minority turnout relative to non-minority turnout are just
14 miniscule, anywhere from two and a half to one to ten to one in
15 terms of high non-minority turnout versus low minority turnout.

16 But Dr. Mayer also said in his testimony on the witness
17 stand that these numbers, while representative of the actual
18 turnout levels in low ticket contests, non-partisan contests,
19 they were not representative of minority turnout in
20 top-of-the-ticket contests, such as, for example, in 2012.
21 Here I believe -- and I apologize because I did not write this
22 number down so this can be checked -- I believe the exact
23 percentage -- and I really don't care because the point is a
24 general one -- that Dr. Mayer gave something on the order of 30
25 percentage points of turnout rather than, say, three percentage

1 points of turnout.

2 And he also noted that white turnout was going to be higher
3 as well, but even so, the ratio of proportion of white turnout
4 to white -- or sorry, non-Hispanic turnout to non-Hispanic
5 voting age population to Hispanic turnout to Hispanic voting
6 age population, that ratio is a lot lower than the ten to one
7 or six to one or four to one that we see in these non-partisan
8 contests.

9 And you must understand that fact from an expert witness
10 perspective, because otherwise you have this puzzle which is
11 that this district which was not 50 percent citizen voting age
12 population in 2002 -- there's no argument about that -- and
13 which certainly did not have a majority of its electorate
14 Hispanic in 2002, nonetheless elected a Hispanic. The only way
15 in which it is possible to understand the puzzle of
16 Assemblywoman Zamarripa's success is to recognize that she is
17 winning a Democratic primary and then with overwhelming
18 Democratic support, both Hispanic and non-Hispanic, winning the
19 general election.

20 Q Doctor, do you believe the -- you heard Dr. Mayer testify
21 about his estimates of registration by Hispanics. Do you think
22 those are reliable estimates?

23 A My general answer to that is no. However, my view as an
24 expert is that to the extent possible the debates in a case
25 should be about the relevant case law, not about exactly which

1 estimates particular experts prefer. I've used willingly the
2 estimates generated for racially polarized voting generated by
3 Dr. Mayer even though I have some quibbles about the way in
4 which they were generated, but they are, in fact, quibbles.
5 I similarly have doubts about the way in which the estimates of
6 a three-to-one ratio of non-Hispanic turnout -- sorry,
7 registration rate to Hispanic registration rate was generated.

8 Q And why is that?

9 A Well, we know some things more or less indisputably. We
10 know, or at least I believe we know, that if a candidate runs
11 for office in Aldermanic District 8, that candidate is a
12 registered voter. So clearly we ought to see candidates who
13 are registered voters captured in the 639 names which are the
14 list which Dr. Mayer used to generate his estimates of Hispanic
15 registration. Dr. Morrison criticized that number because --
16 639, because he said that it was without support in the social
17 science literature, and I would say exactly the same. Using
18 the 639 names will underestimate the number and the proportion
19 of Hispanic registrants.

20 And the way we can see that is if we look at an exhibit
21 which has the names of the people who ran in Aldermanic
22 District 8 between 2000 and 2010. It turns out that there are
23 11 people in that list who are identified by consent as
24 Hispanic.

25 MR. HODAN: Could you put up Table 16 from the

1 pretrial report? That would be the election history in
2 District 8, please. And Attorney Poland indicated this
3 morning, let's put up the one with the -- that has the
4 stipulation on it, please.

5 THE WITNESS: If we turn to Exhibit 1099, as
6 I believe you've asked me to, essentially, this is a stipulated
7 list of actual candidates in the Democratic primary or for the
8 Republican primary or for the general election.

9 MR. HODAN: Could you blow that up just a little,
10 please. Thank you.

11 THE WITNESS: And we can ask which of those names are
12 names which appear on Dr. Mayer's 639 name, Spanish surname
13 list. And the answer to that will be the names which appear on
14 the Spanish surname list are Pedro Colon, who is on that list;
15 Roberto Escamilla, who is the last name on that list; and also
16 continuing down Pedro Colon is repeated several times because
17 he won successfully. Note, by the way, without opposition in
18 either the Democratic primary or the general election. And
19 then you come to a few additional names. Those names, Jose
20 Guzman is in the list of 639; Romona Rivas, Rivas is in the
21 list of 639; and there is confusion about Angel Zanchez
22 because, as far as I can figure out, even though this is the
23 official stipulation, it's wrong.

24 MR. EARLE: Your Honor, we will stipulate that Angel
25 Sanchez's name is Sanchez.

1 THE WITNESS: This I had guessed, shall we say. And
2 I don't know whether or not because Sanchez's name is listed as
3 Zanchez, it would have, in fact, been picked up on the list of
4 639. If, in fact -- so if it's actually listed as Zanchez
5 somewhere, perhaps it would not be. So what we see is there is
6 five names on the list of 639 that is identified as Hispanic
7 based on Hispanic surname matchups, Spanish surname matchups.

8 So now the question is how many names are there that
9 are not accurately reflected in the Spanish surname matchup,
10 and the answer to that is, well, we go down the list and we see
11 who's actually Hispanic. Well, the names I've already
12 identified, Colon, Escamilla, Guzman and Rivas, those are
13 clearly Hispanic because we've identified them in the 639 list
14 and they are Hispanic. Some additional names, Victor Huyke,
15 H. Nelson Goodson for another two, and also JoCasta Zamarripa
16 and Laura Manriquez, these are names which are Hispanic people
17 but they are not on the list of 639.

18 BY MR. HODAN:

19 Q What is the significance of that to your testimony?

20 A The significance of that is that names are being missed in a
21 way that is not consistent with the beliefs actually stated not
22 just by Dr. Mayer but by the Census Bureau, in fairness to
23 Dr. Mayer, about the way in which this list of 639 would
24 perform, because the apparent -- it should pick up about
25 80 percent of the Hispanic names -- sorry, it should pick up

1 about 80 percent of the Hispanic and it doesn't. It picks up
2 five out of the 11.

3 Now, of course, some -- no surname list will pick up all
4 these names. H. Nelson Goodson is not a Hispanic name, and no
5 matter what you do with a Hispanic surname list, it will not
6 classify someone with that name as Hispanic. I think that's
7 relatively straightforward to say. And that's a kind of error
8 that is inevitable when you're dealing with Spanish surname
9 matchups.

10 Nonetheless, we can ask how many Hispanics are there?
11 Eleven. How many Hispanics did Dr. Mayer's estimate say there
12 were? Five. That's assuming he correctly got Sanchez.
13 Therefore, out of the 11 there are six that were missed. So
14 that the estimate of the proportion of Hispanics who are of
15 Spanish surname -- sorry, the proportion of those of Spanish
16 surname who are Hispanic and registered is going to be too low
17 because some of those Hispanics are classified as white or
18 non-Hispanic, and if they're classified as non-Hispanic,
19 they're not counted in the ratio of the proportion of Spanish
20 surname people who are registered to the proportion of the
21 population that is Hispanic voting age.

22 But because they're not counted among the Hispanic
23 registrants, they are being counted among the non-Hispanic
24 registrants, and the consequence of that is that the proportion
25 of non-Hispanic registrants who are seen to be registered is

1 going to be higher than it really is.

2 So there's a double whammy. If you miss the Spanish surname
3 people, the Hispanic -- sorry, if you miss these Hispanics with
4 your surname list, then you're underestimating the registration
5 rates of Hispanic and you're overestimating the registration
6 rates of non-Hispanics, as a consequence of which when
7 Dr. Mayer says that the ratio is three to one, I don't believe
8 it. It's going to be some ratio that is actually less than
9 three to one.

10 And that's really where I will end, I think, given the time
11 we've spent. I could work through a hypothetical. Dr. Mayer
12 indicated that the error rate might be as high as 20 percent.
13 I can work through a hypothetical that will show you that if
14 the error rate were as high as even 20 percent, that you will
15 go from a three-to-one estimate down to something like a
16 2.2-to-one estimate of the relative registration rates among
17 Hispanic and non-Hispanics in -- actually in this case in the
18 city as a whole.

19 Q Dr. Mayer -- pardon me, Dr. Grofman. Earlier --

20 A I'm happy -- I don't have any problem being confused. I
21 happen to think very highly of Dr. Mayer. I've been more than
22 delighted to use his estimates.

23 Q Dr. Grofman, earlier you used the term "missing link" in
24 referring to Assembly District 9.

25 A Yes.

1 Q Can you explain in more detail what you mean by that and how
2 this impacts either the choice the legislature made or the
3 choice that the Court has to make?

4 A The missing link, as I see it, is Assembly District 9. All
5 the focus has been on Assembly District 8, and yet there is
6 some evidence in terms of testimony that took place that,
7 in fact, even Assembly District 9, which is presently an
8 influence district at best, okay, but I think is an influence
9 district, has the potential to become an opportunity-to-elect
10 district over the course of a decade.

11 I've testified here in Wisconsin now, this will be my third
12 decade, and I do remember similar situations which previous
13 courts have confronted. So before I talk more about
14 Assembly District 9, I'm actually going to talk instead about
15 Senate District 4. Senate District 4 was created --

16 MR. EARLE: Your Honor, I'm going to object on
17 relevancy. There's not a claim under the VRA for Assembly
18 District 9's relationship to the 8th Assembly District and has
19 to do with how reapportionment occurred and now we're going to
20 Senate District 4. I interpose an objection on that basis, in
21 the interest of time.

22 JUDGE STADTMUELLER: Mr. Hodan?

23 MR. HODAN: Your Honor, the manner in which
24 Assembly District 8 was formed directly impacted how
25 Assembly District 9 was formed, and the choice that the Court

1 has to make relates to whether 8 was drawn appropriately and
2 part of that analysis has to consider the impact on 9.

3 JUDGE WOOD: And 4 fits in where?

4 THE WITNESS: Yes. Sorry.

5 MR. HODAN: Okay. Well if you allow us just a couple
6 of minutes on 4, because 4 fits in because 4 was a district
7 that had a population less than 50 percent and it elected.

8 MR. POLAND: Your Honors, Senate District 4 was one
9 of the African-American Senate districts. The two districts we
10 are talking about here, 8 and 9, are three, and what happened
11 in a different district, we agreed to drop those claims. And
12 so it seems to me that those claims for the African-American
13 district really ought to be out of play.

14 MR. HODAN: Your Honor, given the lateness of the
15 hour, we'll move on.

16 JUDGE STADTMUELLER: All right. Thank you.

17 MR. HODAN: If you could bring up Exhibit No. 19,
18 please, and if you could turn to page 133. This is a
19 transcript of proceedings dated July 13, 2011 in the matter of
20 the joint public hearing on Wisconsin redistricting plan.

21 BY MR. HODAN:

22 Q Professor Grofman, Representative Zamarripa said this at the
23 hearing. The 8th and the 9th, the 8th is my district, it is a
24 Latino super majority district. The 9th was trending that way.
25 It has already been a Latino-influenced district, and this does

1 give us a larger percentage. But the truth is that, you know,
2 that Latinos have grown by leaps and bounds and we are trending
3 that way anyway. It's almost inevitable. We just grew it.
4 It's not that you created another one. There's not three now.
5 There continues to be and I'm glad to hear that we're moving
6 from a majority to a super majority in the 8th and 9th.

7 Do you share Representative Zamarripa's views?

8 A Yes, I do.

9 MR. HODAN: I have no further questions, your Honor.

10 JUDGE STADTMUELLER: All right. Thank you,
11 Mr. Hodan. Mr. Earle?

12 MR. EARLE: Thank you, your Honor. I will try to be
13 as brief as possible. I have a fair amount of ground to cover.

14 JUDGE STADTMUELLER: Well, we're reasonably ahead of
15 our schedule.

16 CROSS-EXAMINATION

17 BY MR. EARLE:

18 Q I would ask, Professor Grofman, if you would constrain your
19 answer to the question and be as brief as possible so we can
20 have mercy for everybody in this room.

21 A Certainly.

22 Q Thank you. Did I understand your testimony correctly when
23 you said you just have quibbles with Professor Mayer's
24 racially -- racially polarized voting analysis?

25 A Yes, that's essentially correct, but I would agree with

1 Dr. Morrison that there would have been a potentially better
2 way to have done it, but that's a quibble.

3 Q So the Court can accept Professor Mayer's racially polarized
4 voting analysis.

5 A Yes.

6 Q Okay, and I just wanted to understand. Let's go through
7 some quick things here that we can nail down
8 non-controversially. We'll start with your assertion that the
9 8th Assembly district as created by Act 43 lacks a Hispanic
10 citizen voting age majority.

11 A No, I did not say that.

12 Q I thought you said no expert can dispute that the 8th
13 Assembly district lacks a Hispanic citizen voting age majority.

14 A I'm sorry. There was a word that I apologize if it was
15 inadvertently omitted. What I said was that no one can dispute
16 that it lacks a clear voting age population, citizen voting age
17 population majority.

18 Q So you accept the proposition from Professor Mayer that the
19 8th Assembly district as created by Act 43 does not have a
20 majority of Latinos for citizens of voting age?

21 A Sir, the best I can do is to repeat my testimony.
22 I inserted an adjective. You took it out. I'll put it back
23 in. The adjective was "clear."

24 Q Did you testify about whether it was possible to draw a
25 district that had a clear Hispanic citizen voting age majority?

1 A No, I did not.

2 Q And did you testify about that in your deposition?

3 A Yes.

4 Q And you agree that it is possible?

5 A Yes.

6 Q So we don't have a dispute about that?

7 A No, we do not.

8 Q And you saw Professor Mayer's illustrative map that was
9 placed up earlier; correct?

10 A Yes.

11 Q And you agree that that's a viable map demographically?

12 A It is a viable map demographically in terms of its
13 consequences for Assembly District 8. There is no evidence
14 that I can judge on what its consequences are for
15 Assembly District 9.

16 Q Okay. I'm going to focus here on Assembly District 8 as
17 created by Act 43. Okay? And when we deposed you, you got a
18 chance to testify about Professor Mayer's second analysis you
19 did that was -- I think at your deposition it was Exhibit 134.
20 I forgot what number it was here. 134, yes, in the deposition
21 but we have it up on the screen. This is what you were
22 testifying about earlier; correct?

23 A Yes, that's correct.

24 Q Okay. And at your deposition we asked you lots of questions
25 about that; correct?

1 A Yes, that's correct.

2 Q And you commented at length about that. You said you
3 thought it was a helpful?

4 A Yes, that's correct also.

5 Q Okay. And then I asked you if you saw -- if you had a
6 chance to review the complaint that had been filed by Voces de
7 la Frontera. Do you recall that?

8 A Yes.

9 Q And you said you did?

10 A Yes.

11 Q And then we went through the paragraphs of the complaint and
12 I was trying to figure out where you had a quarrel with us and
13 where you agreed with us. Do you remember that?

14 A Yes.

15 Q And we got to paragraph 23.

16 MR. EARLE: Will you call up paragraph 23 of the
17 Voces de la Frontera complaint, please. Perhaps while they're
18 looking for it -- well, we'll wait for a second. I'll use the
19 Elmo.

20 BY MR. EARLE:

21 Q Now, you see paragraph 23. It has the answer below it too,
22 but I read it to you during the deposition. This is the
23 question at page 165, line 5 of your deposition --

24 A Yes.

25 Q -- which occurred on February 3rd, 2012.

1 A Yes.

2 Q Let's go to paragraph 23. And I read, quote, "Over the
3 course of the last decade, the political, electoral conduct of
4 Latino voters on Milwaukee's south side in the vicinity of the
5 recently apportioned 8th and 9th Assembly districts
6 demonstrates that the Latino community is politically
7 cohesive." And I then said "You already testified that you
8 agree with that statement," and you said "I testified that I
9 agree with that statement with respect to District 8 because
10 I've reviewed elections in District 8 in which the Latino
11 community has supported a Hispanic candidate. District 9 is
12 less clear because I have no way of judging whether or not the
13 Hispanic incumbent in place is a candidate of choice of the
14 Hispanic community." And I asked you do you know who that is
15 and you said you did not. Do you recall that testimony?

16 A Yes.

17 Q And you sat here today and listened to Professor Gaddie
18 testify; correct?

19 A Yes.

20 Q And you know Professor Gaddie?

21 A Yes.

22 Q And you have great respect for Professor Gaddie?

23 A Certainly.

24 Q And he sat in that chair and similarly indicated that in his
25 deposition he had also testified that way; correct?

1 A Yes.

2 Q And, in fact, he believed that the political cohesiveness
3 and political and electoral cohesiveness of the Latino
4 community in the context of prong two was that it was
5 remarkably cohesive.

6 A Yes.

7 Q And your testimony at your deposition was similar; correct?

8 A Yes, and will be today.

9 Q And is today. That's good, because I didn't want to
10 misunderstand what you said earlier about political
11 cohesiveness. So we don't have a quarrel with Voces de la
12 Frontera satisfying prong two of the Gingles preconditions;
13 correct?

14 A Here I have to say yes and no. My testimony was and is that
15 the minority community, Latino community is politically
16 cohesive in elections involving a viable candidate in a
17 partisan election where this is no non-Hispanic incumbent.
18 What I said in my testimony on the witness stand was if I had
19 to reach that judgment based solely on the evidence presented
20 by Dr. Mayer, I wouldn't be able to do that because that would
21 be very weak evidence indeed. I never said that my view was
22 not that Hispanics were not politically cohesive. I merely
23 noted that Dr. Mayer's evidence by the time he lops off four of
24 the seven elections that he analyzes is down to a very limited
25 number of elections, in a number of which there is no direct

1 evidence from his reports that minorities are -- Hispanics are
2 politically cohesive.

3 Q I just want the record to be clear, though, that there is
4 not one expert who's testified in this case in this trial who
5 believes that the Latino community is not politically cohesive.

6 A Yes, that's certainly.

7 Q We have complete consensus across the board.

8 A That's certainly correct.

9 Q We don't have to quibble about the first prong because
10 everybody agrees that. The defendants stipulated to it;
11 correct?

12 A Exactly.

13 Q So we're really focused on prong three and the totality of
14 the circumstances; correct?

15 A Yes.

16 Q As a matter of fact, if I understood your testimony, I think
17 you would agree with me that we really don't have a quibble
18 about prong three either. I mean, it's really about the
19 totality of the circumstances.

20 A With the same yes-and-no answer that I gave previously; that
21 is to say, I have absolutely no quibble if the question is am I
22 prepared to believe and on the basis of what I know that there
23 is racially polarized voting or voting along Hispanic,
24 non-Hispanic lines, the answer is I believe it. But if you
25 really forced me to write down what evidence I had to lead to

1 that belief, it would be problematic because the contests that
2 Dr. Mayer has analyzed are contests where in many cases there
3 is no Hispanic candidate of choice and Dr. Mayer has testified
4 that in elections where there is no opposition, it is
5 impossible to estimate racially polarized voting.

6 Q And you agree with that?

7 A No, actually I don't.

8 Q Okay. We'll come back to that. All right. So if
9 I understand it then, we agree on prong one, we agree on prong
10 two, and we kind of agree on prong three. You believe it but
11 you don't -- you have a question as to whether
12 Professor Mayer's report quite gets you there.

13 A Yes, that will be correct.

14 Q So the issue in this case is more about the totality of the
15 circumstances.

16 A Yes.

17 Q And let's go there, all right? Let's go there. In your
18 deposition at page 145 --

19 MR. EARLE: Do we have Professor Grofman's deposition
20 at page 145, line 22?

21 BY MR. EARLE:

22 Q I asked you if you took a Latino district like District 8 or
23 9 and you either reduced the Latino population or added other
24 geographic areas that had a high turnout of non-Latino whites,
25 could that affect the ability of the Latino community to elect

1 a candidate of choice, and I got an objection to form from
2 Mr. Hodan and then we had the question read back, and would you
3 read your answer?

4 A Yes. My answer is "If you take a district which has Latinos
5 in it and you remove Latinos, that reduces the likelihood of
6 minority electoral success."

7 Q Continue.

8 A And it continues -- if you want me to read all of it --

9 Q Yes. Let's go through the whole thing.

10 A If you take a district which has Latinos in it and you
11 somehow add a white population to it without at the same time
12 reducing the Hispanic population, and which I am not sure is
13 mathematically possible given the ideal population constraints,
14 but somehow if you could do it, given, of course, that if
15 you're adding white population to a district the Latino
16 population proportion will decline and therefore the Latino
17 ability to elect the candidate of choice may be affected if,
18 indeed, the Latino population was at a cusp such that its
19 ability to have a realistic equal opportunity to elect
20 candidates of choice would be affected one way or the other,
21 and affected one way or the other by the proportion of
22 non-Latino whites who were added into the district.

23 Q So hypothetically if we had a politically cohesive,
24 geographically compact Latino community and we chop it in
25 half -- maybe not quite half. Let's chop it at 55 percent,

1 okay? And we chop off --

2 A Sixty percent, sir, if I may. I don't want to -- I don't
3 want to agree to what appears to be a statement of fact in your
4 testimony. I believe that the proportion of Hispanics who
5 are -- who remain in old District 8 is 60 percent.

6 Q I'm talking about the core retention. You take the
7 community and you chop it at 55 percent.

8 A That one I will quibble just the slightest. Dr. Mayer gave
9 a 55 percent number. When I did the arithmetic, I got 57.

10 Q Core retention?

11 A Yes.

12 Q Okay. So, well, I think at this point --

13 A One of us is correct and I'm happy to split on 56.

14 Q Okay. So we basically split the community in half, a little
15 bit more than half, and then we take a completely different
16 community that has a high turnout significant white population
17 where the Latino total population is just barely above that and
18 we tack that on. That would raise -- you testified -- what
19 this testimony meant was that you would be concerned about that
20 that terms of how that would affect the Latino community's
21 ability to elect the candidates of its choice; isn't that true?

22 A In a hypothetical that you have just given, which does not
23 match anything except Assembly District 9, it certainly would
24 be correct that reduction of a barely majority Hispanic voting
25 age population further would affect the likely likelihood of

1 Hispanic electoral success.

2 Q All right. Let's go to. I'm going to -- you talked a lot
3 about how important it is from your perspective that we think
4 about the Democratic primary.

5 A Yes.

6 Q And in particular in the context of Assembly -- Act 43
7 Assembly District 8?

8 A Yes.

9 Q Because there's in your view a substantial Republican white
10 population amongst those that have been added to the 8th
11 Assembly; correct?

12 A Yes.

13 Q And those whites are concentrated in the southern parts of
14 the district?

15 A I do not know the demography of the district well enough to
16 indicate exactly where in the southern part, but because old
17 Assembly District 9 that is now in new Assembly District 8 is,
18 generally speaking, the southern portion of the district, the
19 answer would be yes.

20 Q Okay. Well, let's call up Exhibit 185. Here you've got a
21 picture of the old 8th in blue and you have the new 8th in --
22 outlined in black and you have the 9th next to it. Do you see
23 that?

24 A Yes.

25 Q And you can see that the color code indicates the Latino

1 voting age population density by 2002 wards.

2 A Yes.

3 Q And you see the yellow areas in the south of the
4 8th Assembly District?

5 A Yes.

6 Q Okay. And then if we can put next to that Exhibit 184.
7 You've seen these exhibits before; right?

8 A I believe so, yes.

9 Q And you've studied them in preparation for your trial
10 testimony today; right?

11 A That the answer would be no. I've studied the equivalent
12 exhibits that were created for my own expert witness
13 declaration.

14 Q Okay. And you've heard the testimony about 184; correct?

15 A I believe the answer to that one is yes.

16 Q And this represents turnout.

17 A Yes.

18 Q And you see how the green areas, the dark green areas in the
19 southern area of the 8th have high turnout and they also happen
20 to be the areas that are most white and the areas that are most
21 Latino are the areas with the lowest turnout?

22 A Yes.

23 Q And then we were able to kind of overlay the two so you can
24 see how they match perfectly, almost perfectly. Could we do
25 that? You see how there's almost a perfect correspondence

1 between turnout and Latino voting age population density?

2 A Certainly.

3 Q Now, in this scenario you indicated that what was
4 significant to you was that this white high turnout area was
5 heavily -- or you said predominantly Republican, I think.

6 A No, I would say heavily -- it's -- using the methodology
7 that I used, I would estimate it's a Republican voting strength
8 of somewhere between 40 percent -- sorry. Of those -- of the
9 non-Hispanic whites, I would estimate that somewhere between
10 40 percent and 58 percent were Republican.

11 Q And your basis for saying that is?

12 A My basis for saying that is basically the election returns
13 and one further predicate for my expert witness judgment. The
14 further predicate for my expert witness judgment is that the
15 Republican percentage among non-Hispanic whites is going to be
16 higher than, perhaps even considerably higher than the
17 Republican percentage among Hispanics and/or among non-Hispanic
18 minorities. That is to say, I believe that, generally
19 speaking, whites are more Republican than minorities.

20 Q One of the first maps we had here had the 8th Assembly
21 District. It shows the 9th Assembly District in color below
22 it. It was -- maybe can we call that one up? Do you know --
23 it had the -- it had the 8th Assembly District and the 9th
24 Assembly District outlined in yellow and then it had the old
25 Assembly districts outlined in color. There was a tan and a

1 red. 176? Can we try 176. Wonderful. Can you see that? Can
2 we enlarge that a little bit so that we can -- this will
3 demonstrate for you the percentage of the 9th Assembly District
4 that was added to the 8th Assembly District to create the
5 Act 8th Assembly District. Do you see that there?

6 A Yes, that's correct. In the area.

7 Q And that is the area that you're talking about being
8 predominantly Republican amongst the whites.

9 A Amongst whites, that is correct, amongst non-Hispanic
10 whites. Some Hispanics self-identify in the census as white,
11 but we are talking about a non-Hispanic white population.

12 Q And that's based on the performance of whites in the 9th
13 Assembly District and presidential elections or gubernatorial
14 elections?

15 A Gubernatorial elections.

16 Q So you looked at the Walker/Barrett gubernatorial election?

17 A Yes, that's correct.

18 Q Did you look at any other elections?

19 A No, I did not except for general comparisons of the levels
20 of white support for candidates for other contests.

21 Q So the inferences you're drawing, you're drawing from the
22 fact that in the Barrett/Walker race in the 9th Assembly
23 District, Walker did pretty well.

24 A Walker did better than he did in the 8th Assembly District.
25 To say that a candidate who got 30 -- sorry, 31 percent of the

1 vote in new District 8 -- actually sorry. We have to go back
2 to old District 8 -- who got 39 percent of the vote in old
3 District 8 is not necessarily to say that that candidate did
4 pretty well.

5 Q And that is the basis for you drawing an inference that
6 there are -- that whites are heavily Republican in that area.

7 A Yes, that's correct.

8 Q And is there --

9 A Sorry. That is one of the bases for that inference.

10 Q I meant the others.

11 A The other I have not previously spoken about.

12 Q Oh, okay. Well, tell us.

13 A Okay. The other is to look at the turnout in the Democratic
14 primary as opposed to the Republican primary.

15 Q And the Democratic primary for what?

16 A Let me see. That would probably be the Democratic primary
17 in the partisan election. If you give me a moment, I will
18 actually have to find that. That was not done in time to be an
19 exhibit, and so I have to find the relevant piece of paper that
20 has that for me.

21 Q While you're looking for it we can talk. So you basically
22 took a Democratic primary and a gubernatorial race and from
23 that you inferred that the white population is mostly
24 Republican.

25 A The combination of the -- the predicate for this is

1 essentially twofold. The first predicate is that you can look
2 at the votes in the African-American districts and you can look
3 at exit poll data and that that data shows that
4 African-Americans are not Republicans.

5 Q We're not talking about the African-Americans. We're
6 talking about the 9th Assembly District.

7 A With apology, sir, yes, we are, in fact, talking about the
8 African-Americans, because even though they're only a
9 relatively small proportion of the district, we have to rule
10 them out as a possible source of votes to the Republican
11 candidate. So we can establish essentially that the votes for
12 the Republican not coming from the handful of -- the 8 percent
13 or whatever it is, African-American voters in the district.
14 Then we ask what can we say about the votes of the Hispanics in
15 this district, and here, looking at the votes in old
16 Assembly District 8, which gave a 79 percent vote to the
17 Democratic candidate --

18 Q We're talking about 9.

19 A Please, allow me to complete my answer.

20 Q In the interest of time, I want to understand how you --
21 this is an inquiry about how it was that you concluded that the
22 whites in the southern section of the 8th Assembly District
23 under Act 43 from the 9th Assembly District, prior Assembly
24 District, are predominantly Republican. Could you --

25 MR. HODAN: Your Honor, if I may interpose an

1 objection, I believe he's trying to explain the answer and he's
2 not being permitted to answer.

3 JUDGE STADTMUELLER: Well, the problem, you may be
4 true in your representation, Mr. Hodan, but it doesn't appear
5 from Dr. Grofman's response that it's what Mr. Earle is looking
6 for and so he's trying to clarify the question. So why don't
7 we get the witness and the lawyer on the same page and do what
8 is necessary, Mr. Earle, to bring the witness to the page
9 you're looking for some explanation.

10 MR. EARLE: Thank you, your Honor.

11 BY MR. EARLE:

12 Q If you could constrain your answer to the question I've
13 asked. I'm asking you to explain how it is you concluded that
14 the whites in the southern part of the 8th Assembly District
15 are predominantly Republican and you've excluded the blacks by
16 a statistical analysis of a Democratic primary. You looked at
17 a gubernatorial race. Now, let's get to the hub of it. How do
18 you conclude that?

19 A If the African-Americans are not voting for the Republican
20 and the Hispanics are not voting for the Republican, then it
21 must follow that the only -- since there are Republican voters,
22 they have to come from somewhere.

23 Q Okay. This is basis of your expert opinion.

24 A This is one of the two bases, as I started to explain, of my
25 expert opinion.

1 Q Okay. Well, now, given your view, wouldn't you presume that
2 there would be Republican candidates generated in partisan
3 races out of the 9th Assembly District?

4 A Certainly. There may well be Republican candidates coming
5 in that district, but that district, even though it has more
6 Republicans than in old District 8, is still a very safely
7 Democratic district.

8 Q This was an exhibit which we began to prepare but pulled --
9 it's a summary from the bluebooks in Wisconsin going back to
10 2002 through 2010. We had the data here introduced into
11 evidence from Pedro Colon's races where he ran basically
12 unopposed in each general election. There was never a
13 Republican opponent the entire time that Pedro Colon ran for
14 office in the old 8th Assembly District. But what I found
15 curious was you said something about the 9th because lo and
16 behold, there's never been a Republican candidate who's run
17 against Josh Zepnick since 2002 to today in the 9th Assembly
18 District.

19 A The 9th Assembly District is also a safely Democratic
20 district. It is not, however, as overwhelmingly, and I do mean
21 overwhelmingly, Democratic as the 8th.

22 Q So why would a Democratic primary for the new 8th Assembly
23 District have any bearing on the conduct of the white voters
24 from the southern part of that district? I mean, that
25 doesn't -- that doesn't make sense, sir.

1 A The conduct of the white Republican, non-Hispanic white
2 Republican voters is dependent on the context. If you are
3 telling me that that -- those Republican voters have not
4 bothered to contest even in old District 9, then I would simply
5 say that that reinforces my previous testimony that in new
6 District 8 the winner of the Democratic primary is going to
7 win.

8 Q The bottom line sir, is that you didn't look at the partisan
9 electoral history of the 9th Assembly District nor the
10 8th Assembly District in formulating your opinions; isn't that
11 true?

12 A That -- I know the partisan electoral history of the
13 8th Assembly District because it is a district which is -- has
14 been -- has been won by a Democrat. While it's true that I do
15 not know of my own knowledge the partisan affiliation of
16 Mr. Zepnick, my belief, based on the election results for the
17 Barrett/Walker race in District 9 as it previously was
18 configured, is that this is still a Democratic district.
19 I don't know whether or not Mr. Zepnick is a Democrat or not,
20 but I would guess that he might be.

21 Q I guess my question wasn't quite that, sir. My question was
22 what you did to prepare for your opinion, and you did not look
23 at and research and review the partisan conduct of the voters
24 in the 9th Assembly District over time. You just simply didn't
25 do that. You looked at a gubernatorial race and you looked at

1 a Democratic primary and you drew an inference.

2 A Yes --

3 Q Isn't that right?

4 A Yes and no. The data on who wins the Assembly district
5 contest was, in fact, available to me. It was available to me
6 basically from the bluebook and from data provided to me by
7 counsel for both old Assembly District 8 and old
8 Assembly District 9. Reviewing that data, it became quite
9 clear that these were overwhelmingly Democratic districts and
10 now with respect to the Barrett/Walker race, I have
11 confirmation of that historical data with recent data that
12 demonstrates that what was true in the past is still true now.
13 These are overwhelmingly Democratic seats, whether or not one
14 looks at old 8 or new 8 or old 9 or new 9, but there has been a
15 movement of Republicans shifted between old 9 and now new 8
16 such that the proportion of Republicans in new 8 as configured
17 under Act 43 is higher than it was as in AD 8 as configured in
18 2002.

19 Q Do you know what the racial composition of the old 9th
20 Assembly District was on census day?

21 A No, I do not. I would have to check those numbers.

22 Q And did you check before you formulated your opinions?

23 A I know -- I know that the composition of present district --
24 Assembly District 9 is essentially 60.554 percent Hispanic and
25 54.03 percent Hispanic voting age population, and I would

1 believe that the composition of that district was also highly
2 Hispanic even as of the 2010 census, even though it began in
3 2002 as a much, much less Hispanic district. I believe the
4 correct answer to that question -- and I won't swear to this
5 even though I'm on the witness stand -- I believe the correct
6 answer is that it was something like 46 percent Hispanic voting
7 age population in AD 9 circa 2011, but I may be in error.

8 Q I'm curious about this form of reasoning that you come here
9 to testify about where you present opinions based on these
10 types of inferences, and I guess I want to go to the next one
11 because I thought I heard you say that you looked at the 2002
12 12th Assembly District and you said that the 2012 9th Assembly
13 District was a plagiarization of that. Is that accurate?

14 A No.

15 Q No? Let's -- well, let's look at it.

16 A In order to save some time, if I appeared to say that, I
17 certainly did not intend to say that. What I meant to say was
18 there were two influence districts created in 2002. Those
19 numbers had numbers AD 12 and AD 9, and that there were also
20 two influence districts created in 2011 under Act 43 and that
21 those districts had numbers AD 9 and AD 12 but that they had
22 been changed by the legislature in such a fashion that their
23 minority population percentages had been increased over that
24 which was found in the identically numbered districts in 2002.

25 Q Well, what I wrote down was that the legislature had

1 plagiarized this Court's design of the old 12th Assembly
2 district from 2002 and when it designed the new 9th Assembly
3 District in 2012. And you drew -- you drew analogy between the
4 fact that in 2002 the AD 12 was 32 percent African-American and
5 that that grew over ten years to 51 percent --

6 A To 49.8 percent. Then it was changed to increase the 49.8
7 percent to 51 percent to create a majority black but still
8 arguably influence district.

9 Q And then you cited that as the basis for an inference about
10 what might happen from today into the future ten years from now
11 by citing that the 9th Assembly District is at 54 percent and
12 that it's your hypothesis that it will become a majority
13 district in the future?

14 A Based on my review of evidence from now two decades worth of
15 political history and electoral history, the minority
16 population in these areas has continued to grow. Districts
17 such as Senate District 4 when created in 1992 as only an
18 influence district, nonetheless immediately, even though less
19 than a majority black voting age population, elected a black
20 candidate of choice.

21 Having observed this pattern in which districts which were
22 originally created as influence districts over the course of
23 the decade, and perhaps even quite quickly in the decade, came
24 to elect a minority candidate of choice, it is reasonable for
25 me to believe based on that history, plus the undisputed

1 testimony about minority population growth over the past decade
2 and expected minority population growth over the next decade,
3 to believe that these two influence districts, one
4 African-American, one Hispanic, have at least the potential to
5 become opportunity districts by the end of the next decade, or
6 in other words, when I come back in 2022 for my next appearance
7 before a federal district court.

8 Q Okay. Perhaps we'll save you that trip.

9 JUDGE WOOD: Our sympathies.

10 BY MR. EARLE:

11 Q I guess what escapes me, Professor Grofman, is what does the
12 2002 12th Assembly District, which was an influence
13 African-American district at the time, have to do with the 9th
14 Assembly District and the 8th Assembly District in 2011 in a
15 completely different neighborhood with a completely different
16 racial composition. What are the variables? Have you
17 identified any variables in common other than some very loose
18 comparison of percentages ten years apart and one court in
19 common?

20 A The basic predicate on which I based my comparison is the
21 fact that observing Senate District 4 as an influence district
22 in 1992 with black population percentages expected to grow over
23 the course of the decade but still with black population growth
24 less dynamic than Hispanic population growth, having observed
25 that a district which I labeled as an influence district in

1 1992 did, in fact, convert into an equal opportunity district
2 as early as 1992, it seemed to me to be reasonable, based on
3 the evidentiary history of past practices, that a district like
4 AD 9 would, given Hispanic population growth patterns, also be
5 a district which over the course of a decade, not necessarily
6 2012, have such an opportunity.

7 And that, if you want further evidentiary basis, that view
8 is, of course, echoed -- or I shouldn't say echoed because
9 that's the wrong word -- it, in fact, is stated by
10 Assemblywoman Zamarripa in her view about Hispanic population
11 growth and the potential for AD 9 to, in fact, become a
12 Hispanic majority seat which might elect.

13 Q So cutting through all of those words, what those two
14 districts have in common ten years apart is your prediction.

15 A Yes, that's right.

16 Q Okay. So because you predicted that then and you're
17 predicting something now, that is the basis of an opinion
18 that -- that's the foundation for the opinion in terms of its
19 weight; correct?

20 MR. HODAN: Objection. That's a mischaracterization
21 of his prior testimony.

22 JUDGE STADTMUELLER: Okay.

23 THE WITNESS: There is an evidentiary basis for my
24 testimony. It is also the case that when I look at my own
25 record of predictive success, there is a record which suggests

1 that it is not unreasonable for me to believe what I suggest
2 might be the case will happen over the course of the decade.
3 For example, in 1992 there were a group of African-American
4 incumbents who said we need 75 percent. We will lose our
5 districts if we are not --

6 BY MR. EARLE:

7 Q Now you're going into a different area so I'm going to cut
8 you off because that's not responsive to my question. Okay.
9 Let's go to this question of crossover and your views about the
10 African-American population within the 8th Assembly District.

11 A Yes.

12 Q Remember you testified about that?

13 A No, I did not testify about that except indirectly. What I
14 testified was that if you look at the bluebook data for
15 present -- sorry, past Senate District 4 and past Senate
16 district 8 -- sorry, 6, past 4 and past 6, which are heavily
17 African-American areas, one observes that the vote share
18 received by Judge Colon in his Circuit Court contest general
19 election in that overwhelmingly African-American area is,
20 in fact, a percentage of the vote share that is comparable to,
21 if not identical to, the estimates that are give by Dr. Mayer
22 for the degree to which Hispanic voters have supported
23 Judge Colon even in the Hispanic areas of present Assembly
24 Districts 8 and 9. That is, he's getting by this estimate
25 64.7 percent of the vote from Hispanic voters. That's

1 Dr. Mayer's estimate, not mine. The actual bluebook shows that
2 he's getting roughly comparable numbers among the
3 African-Americans and that's the district as a whole, not the
4 most heavily African-Americans districts within it.

5 Q I'm going to ask you again to keep your answers short.
6 I think you can get to the point without quite so much
7 verbiage. Okay?

8 A I will try to give answers that are responsive. If the only
9 way in which I can answer a complex question or a seemingly
10 simple question is with a complex answer, I will do so.

11 Q I'm understanding that, I guess, is the point. So you
12 looked to the two African-American Senate races and how
13 Judge Colon did in those Senate races and based on the
14 electoral conduct of the African-American voters in those
15 African-American Senates.

16 A No.

17 Q No?

18 A No.

19 Q So what do the two African-American Senate districts have to
20 do with how African-Americans in the 8th Assembly District are
21 going to vote?

22 A Insofar as I have any way of making inferences about
23 African-American voters, because I drew on what I could say
24 with confidence about those districts where you can reliably
25 make inferences about African-American voting behavior,

1 districts where the African-American population is so high that
2 you can basically say this is how African-American voters are
3 voting. There are African-American voters within
4 Assembly District 8, but they are scattered, at least as far as
5 I'm aware. I've not done detailed demographic --

6 Q That's not what I'm asking. And you're --

7 MR. HODAN: Your Honor, I understand counsel would
8 like a short answer but he's repeating to interrupt the
9 witness. I would just ask for a little courtesy.

10 MR. EARLE: Your Honor, I'm trying to control the
11 cross as best I can and keep it focused.

12 JUDGE STADTMUELLER: And I understand both sides. So
13 give Dr. Grofman a little bit of leeway and if you after a
14 minute or two believe he's going somewhere that you are not
15 interested in, simply say, as you just did, that's not what I'm
16 asking.

17 MR. EARLE: Okay.

18 BY MR. EARLE:

19 Q I'm going to repeat the question, what we're asking about.
20 We're talking about the African-American voters in the
21 8th Assembly District who you seem to have inferred or opined
22 to this Court will vote in coalition with the Latinos in the
23 8th Assembly District.

24 A Yes, that's correct.

25 Q Okay. And the basis for your view that they're going to

1 vote in coalition with the Latinos in the 8th Assembly District
2 is your observations about electoral conduct in the 4th and 8th
3 Senate districts; is that correct?

4 A Yes.

5 Q That's all I'm trying to get at. See, this was easy. We
6 can do this. All right? So this is you're resorting to
7 exogenous races to predict the behavior of African-Americans in
8 the 8th Assembly District; isn't that true, sir?

9 A No.

10 Q Well, you have this thing called the best evidence rule;
11 right?

12 A Yes.

13 Q And one of your criticisms of Professor Mayer's work in this
14 case and his analysis was that he didn't conduct his -- he
15 didn't base his racially polarized voting analysis on the
16 districts in question; correct?

17 A Yes, that's correct.

18 Q All right. So Professor Mayer, in response to your
19 criticism, went off and gathered ward evidence from that
20 district and looked -- did a second analysis; correct?

21 A Yes, that's correct.

22 Q And you only have quibbles with both of those analyses;
23 right?

24 A Yes. The data. The data, not the conclusions. The data.

25 Q Right, right. And so now, isn't what you're doing, you're

1 going off to the 4th and 8th Senate districts and observing
2 behavior involving Judge Colon and you're saying, oh, those
3 folks voted for Judge Colon, so the African-Americans in the
4 8th Assembly District must be supportive of Latino candidates?

5 A Yes, that's correct.

6 Q Okay. Let's stop there then. That's what I thought you
7 were doing. If we could call up Exhibit 1190. Now, here you
8 drew some conclusions. You criticized the testimony of
9 Christine Neumann-Ortiz.

10 A I did not criticize the testimony. I heard the testimony.

11 Q Okay. Well, you commented on it in a way that was critical
12 of the quality of the reasoning. Isn't that basically what --
13 you said that on one hand Voces de la Frontera and the Latino
14 Redistricting Committee oppose District 8 and 9, Assembly
15 Districts 8 and 9 under Act 43 because it's splitting the
16 community down 16th Street, yet look what they did with the
17 city council. Isn't that the evidence?

18 A Yes, that is exactly right.

19 Q So you're criticizing what you perceive to be a lack of
20 consistency.

21 A Yes.

22 Q And you base that lack of consistency by looking at this
23 map.

24 A Yes.

25 Q And you say, oh, my gosh, this is not the same thing; right?

1 A Yes.

2 Q So let's --

3 A Lack of -- please, if I may add one more point.

4 Q Sure. Keep it brief.

5 A Which is when asked she indicated that this was a map which
6 Voces was, in fact, happy with.

7 Q Now, in your deposition you testified you didn't know
8 anything about the community in question.

9 A That's certainly correct.

10 Q You'd never been there?

11 A That's also correct.

12 Q You've never driven down 16th Street?

13 A That's correct.

14 Q So -- and you think that this is inconsistent, so let's look
15 at this. The aldermanic districts are 39,000 people apiece;
16 correct?

17 A Yes.

18 Q And the Assembly districts are 57,000 people apiece.

19 A Exactly, yes.

20 Q How big is the Latino community in the vicinity of the 8th
21 and 9th?

22 A The Latino community in the vicinity of the 8th and 9th is
23 going to be -- I have to find the sheet that actually has
24 population figures on it, but it's going to be something
25 like -- well, Latino community, the people who are only Latino

1 is going to be something like 60,000.

2 Q How much?

3 A 60,000 would be my quick guess.

4 Q That's a guess?

5 A Yeah. If you wish me to calculate it, I'll find the right
6 chart and I'll give you the exact number.

7 Q Did you research that for your opinions in this case?

8 A Certainly, but the approximate answer is 37,700 something
9 people in Assembly District 8, and if that is approximately
10 65.9 percent of the -- of that district, then it would
11 logically follow if I do the appropriate arithmetic that I can
12 calculate the exact you number but it's going to be somewhere
13 in the thirties, and so when I add the two numbers together, if
14 we're talking about Hispanic population, it should be the case
15 that I'm getting a number somewhere in the 60 to 70,000 range.

16 Q Well, we're --

17 A That's just the Hispanic. That's not the people.

18 Q That's right.

19 A That's not the people.

20 Q You're an expert and you've researched this carefully and
21 you've predicated your opinions on facts and evidence that's
22 presumably a good foundation for it; correct?

23 A Yes, I've looked at numbers.

24 Q What?

25 A Yes, I have looked at numbers.

1 Q And so what is your testimony as to the size of the Latino
2 community on the near South Side of Milwaukee?

3 A My testimony about the size of the Latino community is that
4 it includes something like 60 to 70,000 voters of whom a large
5 portion are concentrated within Aldermanic District 8 and
6 Aldermanic District 12.

7 Q So if we took a community of approximately 70,000 people,
8 that's a community that could support two aldermanic districts
9 that were 39,000 people, each that true?

10 A Certainly.

11 Q And the community would not be sacrificing the ability to
12 elect candidates of its choice by dividing itself into two in
13 order to accomplish that objective; correct?

14 A Yes, that also is correct.

15 Q Okay, and -- but you found it interesting that in
16 Exhibit 1190 we have 16th Street here dividing the two
17 districts.

18 A Yes.

19 Q And you found that inconsistent with the position taken by
20 Voces in this lawsuit.

21 A Generally speaking, yes.

22 Q Okay. Now, you indicated to me that you weren't familiar
23 with the geography. You hadn't actually been there.

24 A That's correct.

25 Q I would suggest to you, Professor Grofman, that if you drove

1 down 16th Street, that straight line at the top, and I have a
2 little pointer here, right there, that's 16th Street; right?

3 A Yes.

4 Q Somebody told you that was 16th Street. Maybe the lawyers
5 did?

6 A That is correct.

7 Q And you relied on that; right?

8 A That is also correct.

9 Q Did they tell you that this was the Menomonee Valley and
10 nobody lived there and it's industrial and there was a viaduct?

11 A No, they did not.

12 Q Did they tell you that National crosses where that little --
13 see where I'm pointing right there?

14 A Yes.

15 Q That's national. And then so rather than split the business
16 district, the 8th -- the 12th aldermanic district jogged over a
17 few blocks so as to keep the business district intact.

18 MR. HODAN: Counsel, are you asking a question or are
19 you testifying?

20 MR. EARLE: I'm asking whether you told him that.
21 I'm asking him whether you told him that.

22 MR. HODAN: Withdraw the objection then.

23 BY MR. EARLE:

24 Q I'm sorry, I didn't mean to do that. Sorry. I'm like
25 Darth Vader here.

1 A Again, I am not an expert on Milwaukee. I would simply note
2 that if the business district is the tracts that are to the --
3 the brown -- the tracts in brown that are to the left of the
4 line that shows the aldermanic boundaries, then if those are
5 the tracts that we're arguing about, if you put them together
6 with -- if you put them together with Aldermanic District 12,
7 they are together; if you put them together with
8 Aldermanic District 8, they are together. And I'm simply not
9 in a position to debate with you the demography or geography of
10 the Hispanic community other than to point to the map as shown.

11 Q But I will represent to you that the business district in
12 the 12 Aldermanic District is not split. Okay? That's simply
13 a matter of fact that the Court I think could take judicial
14 notice of and --

15 MR. HODAN: Objection, your Honor. Counsel is
16 testifying again.

17 MR. EARLE: All right. Well, we will find a map
18 that -- you will not stipulate that 16th Street is right there?

19 MR. HODAN: I'm not -- you're testifying, counsel.

20 MR. EARLE: Okay.

21 BY MR. EARLE:

22 Q Well, now, on the other hand, Professor Grofman, the Act 43
23 did split the business community of the Latino community; isn't
24 that correct?

25 A Certainly if that's -- that is unrebutted testimony and

1 I have no reason to believe otherwise.

2 Q And the Assembly districts require 57,444 people, don't
3 they?

4 A That also is indisputable.

5 Q And the Latino community in Milwaukee is not large enough to
6 support two majority Assembly districts with effective voting
7 majorities; is that correct?

8 A That also is correct.

9 Q But it is possible to support one Assembly district with an
10 effective voting majority; isn't that correct?

11 A Yes, that also is correct.

12 MR. EARLE: Thank you. No further questions.

13 JUDGE STADTMUELLER: Thank you. Mr. Poland, do you
14 have any questions of the witness?

15 MR. POLAND: No, your Honor.

16 JUDGE STADTMUELLER: All right. You may redirect,
17 Mr. Hodan.

18 REDIRECT EXAMINATION

19 BY MR. HODAN:

20 Q Just a couple of questions, Dr. Grofman.

21 A Certainly, sir.

22 Q It was suggested that you did not look at the census day
23 population for Assembly District No. 9.

24 MR. HODAN: Could you please bring up Exhibit 1181,
25 please? And turn to Exhibit No. C in Professor Grofman's

1 expert rebuttal report.

2 BY MR. HODAN:

3 Q Professor Grofman, is that a copy of Exhibit C in your
4 report?

5 A Yes, it is.

6 Q Do you see any reference to the sentence state Hispanic
7 voting age population in Exhibit No. 9?

8 A Yes, it is exactly 46.18 as opposed to my recollection that
9 it was 46 percent.

10 Q It was also suggested that or at least inferred that you
11 didn't consider the population of the Hispanic community in the
12 general vicinity of Assembly Districts 8 and 9.

13 A Yes, it seemed to have been suggested and that, of course,
14 is in error since I reported in my declaration exactly the
15 data, at least in percentages terms, for the Hispanic voting
16 age population and voting age population in 8 and 9, which is
17 to say the area of the Hispanic community.

18 Q Could you turn to paragraph 16 of that same exhibit, please.
19 Professor Grofman, do you see paragraph 16?

20 A Yes.

21 Q And could you indicate whether you calculated the Hispanic
22 population in the areas of Assembly District 8 and 9 and what
23 your conclusions were?

24 A Yes. I calculated the Hispanic population and voting age
25 population proportions and those were contained in a somewhat

1 different exhibit, I believe it's Exhibit B or Exhibit D to my
2 declaration, which shows, I believe the number would be
3 65.9 percent Hispanic population in Assembly District 9 and a
4 smaller number in Assembly District -- sorry, the first number
5 was for Assembly District 8 and then a somewhat smaller number
6 for Assembly District 9.

7 Q Professor Grofman, I just have one more question that has to
8 do with cohesion. You were asked whether the Hispanic
9 community is politically cohesive and I believe you were about
10 to give an answer and perhaps did not have an opportunity to
11 answer that as you might have liked, would have liked. Could
12 you tell us again whether you believe the Hispanic community is
13 politically cohesive, and if so, in what type of races.

14 A I believe the Hispanic community is politically cohesive in
15 contests which are partisan in character where there is a
16 Hispanic candidate of choice available to the Hispanic
17 community and where there is not a non-Hispanic incumbent in
18 place whose presence might have a chilling effect on Hispanic
19 political opportunities to elect and also may have an effect on
20 Hispanic political cohesion because of the advantages of
21 incumbency.

22 Q And is it -- do you believe that based on the evidence that
23 we've seen through this trial that there has been evidence
24 indicating that the Hispanic community is cohesive in
25 non-partisan races?

1 A The available evidence from the non-partisan races suggests
2 that either the Hispanic community is not cohesive or
3 essentially it's pretty close to too close to call.

4 Q Professor Grofman, you testified in many cases. You've
5 submitted numerous articles, amicus briefs to the
6 Supreme Court. How would you characterize this Voting Rights
7 Act claim?

8 A We satisfy the prongs of Gingles thanks primarily to the
9 testimony of the expert witnesses for defendants, who, despite
10 the relative paucity of clear evidence in favor of minority
11 political cohesion or in favor of racially polarized voting,
12 nonetheless both Keith Gaddie and I have testified that in our
13 honest view, the Hispanic political community is cohesive and
14 that there is the potential for racially polarized voting even
15 though the evidence for it is, shall we say, scant on the
16 ground in terms of that which was presented at this trial.

17 Q And do you have an opinion again, and we'll end here, based
18 on that evidence whether the incumbent is going to win the
19 Democratic primary in 2012?

20 A It is based -- it is my testimony that based on what I have
21 seen about elections in every minority district, including, but
22 not restricted to, Assembly District 8, that when there is a
23 minority incumbent in place, that minority incumbent has a
24 virtual certainty of winning the Democratic primary and
25 effectively in the heavily minority areas a certainty of

1 winning the general election.

2 Q You were asked about your analysis of the African-American
3 support for Hispanic candidates. How would we be able to tell
4 whether any African-American supported Hispanic candidates in
5 Assembly District No. 8 since 1998?

6 A The minority population, African-American population in
7 Assembly District 8 is simply too small to identify its voting
8 behavior from any of the standard statistical tools that I or
9 any of the other experts have at our disposal. The only way to
10 make inferences about African-American voting behavior in
11 Assembly District 8 is to look at African-American voting
12 behavior in other areas where the size of the African-American
13 population is large enough and concentrated enough to be able
14 to draw reliable inferences from voting behavior in the
15 district about the voting behavior of African-Americans.

16 Q Now, you were accused of being inconsistent in doing that.
17 Is it true that there are elections, election history in
18 Assembly District 8 that we can look at to figure out how the
19 Hispanic community has done?

20 A No, I was not being inconsistent because --

21 Q No, pardon me. I was suggesting you were being accused of
22 being. Go ahead.

23 A I was not being inconsistent because, first of all, one is
24 comparing apples and apples. That is to say, one is comparing
25 in this case the Circuit Court contest in Assembly District 8

1 as those voters voted for or did not vote for Judge Colon with
2 the Circuit Court contest in Senate Districts 4 and 6 insofar
3 as the African-American voters in those contests did or did not
4 vote for Judge Colon.

5 And in fairness to Mr. Earle, it would be reasonable for me
6 to add, as I have in my previously published work, one more
7 caveat to the definition of best evidence, which is the best
8 evidence is evidence you can get. Evidence that you can't find
9 is almost by definition not the best evidence.

10 MR. HODAN: I have no further questions.

11 MR. EARLE: Just a brief.

12 JUDGE STADTMUELLER: Certainly.

13 MR. EARLE: Brief cross.

14 RECROSS-EXAMINATION

15 BY MR. EARLE:

16 Q So I guess where we are is in the totality of the
17 circumstances; correct?

18 A Yes, that's correct.

19 Q And the question is what is going to happen in the next
20 election; correct?

21 A Yes.

22 Q Could we get up 202, please? Now, let's put up 199 first.
23 If you look at this map, 199, do you have any suppositions
24 about how the African-Americans in the city attorney race in
25 April of 2008 voted?

1 A No, I have not looked at that.

2 Q Well, based on the studies that you've done and the opinions
3 you've rendered in this case, how do you suppose the
4 African-American residents in the old 8th Assembly District
5 voted with regards to the race of Pedro Colon versus
6 Grant Langley?

7 A I'm sorry. The legend here can you please explain for me?

8 Q Oh, sure. I'm sorry. The legend is -- blue is Latino
9 votes. So blue are supporters of voters who voted for Pedro
10 Colon. The darker the blue, the higher the percentage. And
11 the reddish maroon is Grant Langley. The darker the red, the
12 more heavier the percentage for Grant Langley.

13 A Yes.

14 Q So these are actual votes and what really happened.

15 A Yes.

16 Q And so if you can see the configuration of the Act 43
17 8th Assembly District there, you can see that in the northern
18 part Pedro Colon won.

19 A Yes.

20 Q Now, are you -- is it your inference based on what you've
21 looked at in this case that the African-Americans living in
22 that area voted for Pedro Colon?

23 A That is not possible -- it is not possible for me to make
24 any inference from the data that you presently have before me
25 or any other data which has been made available to me or that

1 I can imagine being made available to me that will would allow
2 me to directly determine the voting behavior of the
3 African-American voters located within Assembly District 8.

4 Q Okay, okay. So maybe I misunderstood your testimony. So
5 where we are then is that prognostically at this point for
6 Assembly District 8 as drawn by Act 43, you're not saying that
7 the African-American voters in that district will likely
8 coalesce with the Latino voters in that district; is that
9 right?

10 A Yes and no. There is no evidence directly from
11 Assembly District 8. The only evidence is how
12 African-Americans voted in Senate District 4 and
13 Senate District 6 for Colon, and the evidence from those other
14 African-American voters is that they voted for Mr. Colon.
15 That's all that I can say and I don't think we need to belabor
16 this.

17 Q What happened in the 4th and the 8th; right?

18 A Yes.

19 Q Fair enough. So but you do agree, I presume, that the
20 results of this race depicted here that really happened is
21 relevant to the totality of the circumstances; correct?

22 A Yes.

23 Q And it's something that the Court ought to take into account
24 in deciding under whether the totality of the circumstances the
25 ability of the Latino community to elect the candidates of its

1 choice have been impermissibly impaired by Act 43.

2 A Yes. Again, subject to the stipulation with those
3 qualifications I have made about this contest.

4 Q So in other words, it would be a reasonable ruling of this
5 Court to conclude that Act 43 violates the Section 2 of the
6 Voting Rights Act with regards to Latinos in
7 Assembly District 8; right?

8 A No. I'm sorry, I don't follow the logic. If you'll
9 clarify, I can respond to individual questions that address
10 factual questions.

11 Q Okay. Well, we've cleared all the prongs. I mean, there's
12 no dispute there; right?

13 A Yes.

14 Q So now we're in the totality of the circumstances, right,
15 and we have clear evidence of an election; correct?

16 A Yes.

17 Q And it's relevant and it shows that Pedro Colon would have
18 lost an election against a white opponent in the new district;
19 right?

20 A Yes.

21 Q And we know that the Latino community suffers from
22 socioeconomic burdens; correct?

23 A Yes.

24 Q That the whites who live in that area don't; correct?

25 A Yes.

1 Q And we know that they have a lower turnout rate than the
2 whites who live in that area; correct?

3 A Yes also.

4 Q And while you quibble about the statistics, we know that the
5 their registration rates are lower than those of the whites in
6 the area; correct?

7 A Also correct.

8 Q So can you identify one factor, just one, that would support
9 a conclusion that the voting rights of the Latino community
10 under the totality of the circumstances have not been impaired?

11 A There are essentially at least three, so let's take them
12 kind of one at a time. The first is whether or not reasonable
13 inferences can be drawn from this election, which I believe is
14 a non-partisan election, though perhaps I am wrong about that.
15 I don't know. I've not seen this exhibit until rather
16 recently. And in any case, it is an election which is on
17 I believe a different time calendar than the general elections.
18 That would be first.

19 The second relevant differentiation would be the
20 characteristics of the candidates in this contest as compared
21 to the candidates in the Colon, Judge Colon contest where he
22 wins in the district. Here Mr. Colon is running against a
23 very, very well-established candidate, an incumbent of
24 long-term, and, in fact, that incumbent wins and has won in
25 this district and probably most others for a while. So that's

1 the second difference.

2 And the third difference is, as I indicated in my previous
3 testimony, that when -- that inferences from non-partisan
4 contests to partisan contests are highly problematic, and,
5 indeed, as I started to say at one point but did not really
6 complete my answer, there is evidence that the Republicans, the
7 whites, the non-Hispanic whites in old 9 who are now in new 8
8 are, in fact, more Republican or the district itself is more
9 Republican than is the case with old District 8 as evidenced
10 here by actual turnout on election day in Democratic and
11 Republican primaries.

12 MR. EARLE: Thank you. I have no further questions.

13 JUDGE STADTMUELLER: Mr. Hodan?

14 MR. HODAN: Nothing further, your Honor.

15 JUDGE STADTMUELLER: Thank you, Dr. Grofman. You may
16 step down and you're excused. Mr. Kelly, any further evidence?

17 MR. KELLY: We have no further witnesses at this
18 time, your Honor.

19 JUDGE STADTMUELLER: All right. Mr. Poland,
20 Mr. Earle?

21 MR. EARLE: Your Honor, we had contemplated the
22 possibility of recalling Professor Mayer on that one question
23 we talked about earlier and I guess at this point we'll retract
24 the request and rest as well.

25 JUDGE STADTMUELLER: All right. With that knowledge

1 subject to counsel reviewing with my staff the receipt of all
2 of the exhibits, the Court does herewith declare the receipt of
3 evidence in this case closed.

4 That brings us to the point in our schedule where we
5 are going to recess until 7:00 o'clock. During that period
6 I would like counsel to review among yourselves and at about
7 ten minutes to 7:00 to meet with Mr. Willenbrink to ensure that
8 the Court has, in fact, possession of all of the exhibits that
9 were actually received during the trial and at 7:00 o'clock we
10 will begin with counsel's closing arguments.

11 Are there any other matters that we need to address
12 in the interim? Hearing none, the courtroom will be open and
13 I believe there is a court security officer at the Jackson
14 Street entrance for those of you who are awaiting the delivery
15 of an evening meal, and to the extent that there are others who
16 would like to leave the building and come back, please be at
17 the entrance at about 6:55, about five minutes before the Court
18 reconvenes, and someone will allow you to return. The Court
19 stands in recess.

20 THE BAILIFF: All rise.

21 (A recess was taken.)

22 MS. LAZAR: We're on the record. This is Assistant
23 Attorney General Maria Lazar, also Dustin Brown and Jacqueline
24 Schwartz, paralegal, and we're going to read the list of
25 exhibits that are accepted by both parties or acceptable to

1 both parties to be introduced into the record.

2 They are -- and I'm going start with pages, so
3 they'll be a little bit odd. So, for example, we have 2, 2A, 3
4 through -- 3 through 17, not 18, 19 through 22, not 23, 24
5 through 27, then 30. 31 is going to be the subject of a
6 stipulation but it does go in. 32 through 34, not 35, 36 and
7 38, 38A, 39, 41 through 45, 49, 49A, then 50 through 55, 57 and
8 58, 60, 63, 66 and 67, 71 through 73, 77, 79, 81.

9 Then Exhibits 83, 84 and 85 are the subject of a
10 stipulation but they will go in. 88 through 90, 92 through 93,
11 95 through 125, 128, 130 through 136, 139, 140 through 144, 155
12 and 156, 166, 169, 173 through 176, 178, 181, 182, 184, 185,
13 188, 197 through 205, 206 through 209, 220 through 231 --
14 actually make that through 232, 237, 240. And that's where we
15 end on the plaintiffs' numbers.

16 Going to the defendants' numbers that start with
17 1000, the first number going in is 1002, then 1017, 1020 and
18 1021, 1025, 1028 through 1034, 1038 and 1039, 1041 through
19 1061, 1065 through 1076, 1078 to 1080, 1082 through 1084, 1086
20 through 1111, 1112 through 1114, 1117, 1118, 1120 through 1138,
21 1151 through 1159, 1166, 1174 through 1192, and that is it.
22 Can you guys say you agree?

23 MR. BROWN: We agree.

24 MS. LAZAR: And you have our designations. You want
25 us to move these in officially? Then still on the record,

1 we're moving in the deposition designations for the defendants.
2 They include Peter Barca, Adam Foltz, Joel Gratz, Joseph
3 Handrick, Tad Ottman, Jesus "Zeus" Rodriguez, Michael White and
4 James Troupis, and those are the ones attached on a document
5 that is being handed to the clerk at this point in time.

6 MR. BROWN: And the deposition designations for the
7 Baldus plaintiffs, these have all been filed under the docket
8 ECF and I will also submit them in paper. The first is in
9 docket number 158-2 as Exhibit B to the joint pretrial report.
10 These designations are for witnesses Adam Foltz, Joel Gratz,
11 Joseph Handrick, Tad Ottman and Jesus Rodriguez.

12 We also have counterdesignations that appear at ECF
13 docket number 180-1. This is Exhibit A to plaintiffs' response
14 to defendants' statements of contested facts and proposed
15 conclusions of law. These are counterdesignations of witnesses
16 Peter Barca, Adam Foltz, Joel Gratz, Joseph Handrick, David
17 Maier, Jesus Rodriguez, Tony Vander Wheelen, and Michael White.
18 And finally, on docket number 200, there are deposition
19 designations for Peter Morrison and James Troupis. Thank you.

20 (A recess was taken.)

21 THE BAILIFF: All rise.

22 JUDGE STADTMUELLER: Let the record reflect that we
23 have once again reconvened in the matter of Baldus, et al.,
24 versus Brennan, et al., and we will call upon counsel for the
25 Baldus bailiffs for their closing argument. I believe counsel

1 have made their record with regard to the receipt of all of the
2 exhibits. Is that correct, Mr. Willenbrink?

3 MS. LAZAR: We just wanted to put one thing on the
4 record that we had agreed to. It was four of the exhibits. We
5 did not call one of our experts John Diez, D-I-E-Z, but we had
6 stipulated, all parties, to the admission of the evidence, his
7 report. Those exhibits 31, 83, 84 and 85. We submitted them
8 in with the court reporter before. But we just wanted to make
9 sure that that was clear on the record that we had that
10 stipulation.

11 JUDGE STADTMUELLER: All right. Thank you,
12 Miss Lazar. Mr. Poland?

13 MR. POLAND: Your Honor, I believe Mr. Earle is going
14 to precede me. He will argue the Section 2 claims for both the
15 Voces plaintiffs and the Baldus plaintiffs.

16 JUDGE STADTMUELLER: Thank you. Mr. Earle?

17 MR. EARLE: May it please the Court. If the
18 legislature had done what this Court did in 2002, we would not
19 be here today trying this case. The state of Wisconsin and the
20 city of Milwaukee, the Latino community of Milwaukee has
21 suffered through an unnecessary experience. This has been a
22 fool's errand, initiated by the state of Wisconsin, the
23 legislature of the state of Wisconsin.

24 And the words "fool's errand" don't quite capture
25 what happened here. I was, struggling, I wanted to come up

1 with a phrase that would capture the essence of this experience
2 we've been through in this litigation, and the best word I
3 found, because I wanted -- a fool's errand doesn't quite
4 express the paradoxical silliness of it and the serious,
5 serious consequences of it. And so the best word is in
6 Spanish. It's a babosada. In Spanish babosada means this
7 situation should not have happened.

8 We have suffered in Wisconsin badly as a result of
9 the poor judgment of the leadership of the legislature. They
10 chose to initiate a process in secrecy, hide it from the
11 public. I won't go into all the details about that, but what
12 they did in that process is they deprived the community of the
13 ability to scrutinize what was being done. They provided --
14 they denied the community to participate, they denied the
15 community the ability to participate in a meaningful fashion
16 and provide insight. If you contrast that with what happened
17 in the city of Milwaukee where it was wide open, it was
18 transparent, everybody could participate, people could look at
19 the maps, criticize the maps, make their points of view known.
20 The legislators could account for that and if there was
21 something wrong, it was likely to get pointed out. Every
22 constituency that was affected had an opportunity to speak, and
23 if that constituency had a claim, had a basis to criticize
24 something in the process, they could, and the -- that
25 legislative body had the benefit of all of that input.

1 Here in this case, the legislature in Wisconsin
2 privatized the whole process behind the walls of a private law
3 firm, required the legislators who were a party to the process
4 to sign secrecy agreements, and then trotted out their product
5 on July 8th. And they trotted it out in a fashion which
6 deprived the community of being able to evaluate what it was
7 that the community was being presented with, despite the advice
8 of Professor Gaddie, who specifically said consult the
9 community. He was emphatic about that, and the emphasize in
10 that is even more clearly set forth in the transcript of his
11 deposition. He told Eric McLeod, he told Adam Foltz, he told
12 Jim Troupis, he told Tad Ottman, consult the community. And
13 they didn't do it.

14 And if you look at the e-mail that -- I think it was
15 Adam Foltz who sent it to Professor Gaddie and to all the
16 others on the team saying here's Voces de la Frontera, here's
17 what they're saying about the city map, in June, early June,
18 you know, they knew the Latino Redistricting Committee was out
19 there, they knew Voces de la Frontera was out there, they knew
20 the community was acutely interested in what was going to be
21 happening in terms of redistricting in Milwaukee. And I'm not
22 arguing this as intent. I'm arguing this as the sad reality in
23 which all of this happened. All right.

24 So then June 8th, here we have the maps, and they
25 preempted state law that had been -- they changed it, because

1 at that point in time, at the point that we got to this point,
2 the law required the municipalities to go first, define the
3 ward lines, and then the state would follow. And in this
4 instance what we have is -- and the municipalities did go first
5 and the community did have an opportunity to participate at the
6 municipal level.

7 But then we get this map and this plan on July 8th,
8 and it's drawn by census blocks, census tracts. It was
9 virtually impossible to take a look at those maps and
10 understand the consequences in terms of the different
11 communities of interest and it was impossible for the Latino
12 community to do that in the context of 8 and 9.

13 So the Latino community went to Madison, testified at
14 the hearing on July 13 and said we need more time. We don't
15 know what is being done here. We can't understand what is
16 being done. And that's the tragedy of it all, because if it
17 had been an open process, if adequate time had been given, the
18 case that you've heard here today about the reality of -- for
19 the last couple of days about the reality of the Latino
20 community, how it is configured and how this map would affect
21 it could have been made to the legislature, and the wisdom of
22 proceeding with that knowledge at that point would have been in
23 the hands of the legislature.

24 They deprived themselves of that opportunity and as a
25 result, they themselves are not here today but they're the real

1 party in interest in terms of being an adversary on the other
2 side. They've been calling the shots. They're the ones who
3 declined the Court's clear invitation to revisit this matter
4 and fix it once and for all. So here we are and I'm arguing to
5 this Court that we need to have justice done for the Latino
6 community and the 8th and 9th Assembly Districts.

7 We've heard a lot -- you know, this is the kind of --
8 reminds me of a situation where we're truly talking about
9 apples and oranges. The entire argument that the defendants
10 have made is based on the political history of the 8th Assembly
11 District as it was initially -- as it existed on census day.
12 It successfully elected Pedro Colon for a decade. As a matter
13 of fact, the predecessor district which had 98 percent core
14 retention or 90 something percent -- excuse me. I don't think
15 it was 98 percent but it was 90 something percent core
16 retention into 2002, that district reflected the community
17 effectively and provided the community with an opportunity to
18 elect the candidates of its choice. That community grew over
19 the course of the decade and when we got to census day, they
20 cut it in half.

21 And they insist, they insist that the political
22 experience of being able to successfully elect Latinos from
23 that district means somehow that Act 43 passes muster with the
24 Voting Rights Act, but it's a different district. It's
25 fundamentally different.

1 So it's not -- let's look at what's not disputed here
2 today, what's absolutely clear. What's absolutely clear is
3 that the Latino community is big enough to sustain a single
4 district with an effective voting majority in it. That
5 takes -- that requires a population of 57,000 reapportioned
6 into a district. And if you -- and Dr. -- Professor Mayer
7 testified that there are approximately 71,000 Latinos living in
8 the visit of the 8th and 9th Assembly districts. That's
9 obviously not a number that's going to support two districts.
10 There are a hundred and three Latinos living in the city of
11 Milwaukee.

12 So we have 71,000 people in the vicinity in the near
13 South Side in one community, and Cesar Chavez Drive runs right
14 down the middle and is the core, the heart of the community.
15 That's where the community goes to celebrate spontaneously on
16 Mexican Independence Day. That's where the community goes to
17 shop. That's where the community goes for health care. That's
18 where the community goes just to be out in the community. It
19 is, I would contend, the modern day United States equivalent of
20 a soca [phonetic] in a Mexican community. It is the heart of
21 the community, and they chopped right down the middle without
22 any regard for how the community felt about that. And they
23 went so far as to irrationally make a little dog leg and a
24 little block that they chopped out where they chopped out
25 El Rey Supermarket. They chopped out the 16th Street Community

1 Health Center and a McDonald's that's along the way and put
2 that in the 9th Assembly District. Now, so that's not
3 disputed. None of this is disputed.

4 And apparently, despite some of the testimony, the
5 conflicting testimony, it's not disputed that that community is
6 politically and electorally cohesive. Each of the defendants'
7 experts in the deposition, in response to the complaint with
8 the complaint in front of them, testified it was politically
9 cohesive. It was a politically cohesive community. There was
10 no dispute walking into this trial. I was surprised to hear
11 testimony to the contrary, but under cross-examination it
12 became clear that each of these experts stuck by their
13 testimony in reality, in the end. There is no dispute that the
14 Latino community in Milwaukee is cohesive. And if there's one
15 thing that the old 8th Assembly District does show, it shows
16 that cohesiveness in electing Pedro Colon over and over and
17 over again.

18 Finally, there's no real dispute regarding whether or
19 not the common is racially polarized. We have the clear,
20 unequivocal testimony of Professor Mayer. We have two reports,
21 one corroborating the other, and we have no counter racially
22 polarized voting analysis by any of the defendants' experts,
23 and they knew that that was front and center in this case. It
24 was in the complaint and it's a necessary precondition to
25 bringing such a claim.

1 If the defendants felt that there was a lack of
2 racially polarized voting here, they could have hired an expert
3 to do that. And each of their experts -- well, at least two of
4 their experts are qualified to do that. Professor Gaddie and
5 Professor Grofman are qualified to perform racially polarized
6 voting analysis, and both of them only had quibbles, quibbles
7 with the racially polarized voting analysis of Professor Mayer.

8 So in the end, pushed on cross, Professor Grofman
9 said I concede the three Gingles preconditions. He agreed that
10 this case stood or fell on the totality of the circumstances.
11 And that's where we are, and that's where we are. And when I
12 asked him, I said Professor Grofman, what do we have to counter
13 the evidence that we have put in in support of our position on
14 the totality of the circumstances. I didn't quite those words
15 but your Honors were witnesses to what I said, and Professor
16 Grofman relied on -- he said there were three things. I didn't
17 quite understand the first one, but incumbency he said, and I
18 forgot what the third one was, but he identified three things,
19 you know.

20 Now, what do we have on our side to show that the
21 totality of the circumstances weigh in our favor on this
22 question? And this is the most important thing. I think it's
23 necessary that we start with Exhibit 199. It's the
24 configuration, the geography of what was done. I'm sorry.
25 Wrong map. If we could go to 185.

1 This shows the general distribution of the community,
2 and you can see that down here in the southern part we have an
3 area that is more heavily white than it is Latino. And your
4 Honors have seen repeatedly the green map that goes with that,
5 184, that demonstrates the differential in vote turnout. And
6 it's clear that this non-Latino area with high voter turnout is
7 a different neighborhood, a different community, which can and
8 will overwhelm the vote, the vote of the Latino community and
9 impair the ability of the Latino community to elect its
10 candidates of choice.

11 And the proof is in the pudding when we look at
12 Exhibit 199. In Exhibit 199 we can see what happened when
13 Pedro Colon ran against Grant Langley. When Pedro Colon ran
14 against Grant Langley in 2008, he had been the elected
15 representative of the 8th Assembly District for ten years. He
16 was in a leadership position in the state legislature. He was
17 on the joint finance committee. He had run for mayor,
18 all right. He ran against Grant Langley and won almost every
19 single ward in the old 8th and he lost every single ward in
20 those portions that came from the 9th Assembly District. This
21 was a dry run of what the future holds under Act 43.

22 Professor Grofman said the best evidence is what
23 actually happens when you look at the districts and this is
24 what actually happened in 2008, April 2008. This is the most
25 concrete, clear evidence of what will happen in this election,

1 in the upcoming 2012 election.

2 And when you combine that with the clear -- nobody
3 disputed the differential and socioeconomic burdens. Nobody
4 disputed the differential in turnout. No one disputed although
5 they quibbled with the form of analysis with regards to voter
6 registration. Every single identifiable factor that applies to
7 these circumstances weighs in favor of the plaintiffs' claims
8 that the voting rights of the Latino community will be impaired
9 by this map. It will deprive the Latino community of the
10 effective voting majority for the next ten years.

11 According to Professor Morrison, if we credit his
12 1 percent per year growth rate, the Latino community will not
13 recover from this blow for eight years in the 8th Assembly
14 District and they won't get anywhere in the next decade in the
15 9th Assembly District. This is a serious deprivation of 12
16 years of political progress, electoral progress by the Latino
17 community in Milwaukee, and the Latino community in Milwaukee
18 should not have to suffer the consequences of this babosada,
19 this fool's errand that this legislature embarked upon.

20 I respectfully but forcefully request and ask that
21 this Court rule in favor of Voces de la Frontera and the Baldus
22 plaintiffs on the Section 2 voting rights claim as it affects
23 the 8th Assembly District in Milwaukee.

24 JUDGE STADTMUELLER: Thank you, Mr. Earle.
25 Mr. Poland?

1 MR. POLAND: Thank you, your Honors. Judges
2 Stadtmueller, Wood and Dow, may it please the Court, the
3 redistricting legislation before this Court has three fatal
4 flaws under federal, not state, law. Mr. Earle has already
5 explained that Act 43 violates the Voting Rights Act for its
6 treatment of the Latino community on Milwaukee's South Side.
7 It violates the federal Equal Protection Clause as well for the
8 massive population movements, without any explanation or
9 justification, that needlessly destroys communities of
10 interest, including core populations of existing districts. It
11 violates the Equal Protection Clause as well for its
12 disenfranchisement of so many voters in State Senate elections
13 without any rational basis.

14 The defendants have argued that the legislative
15 process is not on trial here, but as Mr. Earle explained, it is
16 because the process, like the product, defies a rational
17 explanation. In the first days of discovery taken in this
18 case, once the privilege arguments began to fall, the drafters
19 of the boundaries testified under oath in depositions that
20 politics played no role in the design of the 99 Assembly and 33
21 Senate districts. Those three people, Tad Ottman, Adam Foltz
22 and Joseph Handrick, testified politics played no role. You
23 can read that in their deposition testimony that's been
24 designated, and we take them at their word when they say that.

25 Well, now that begs the question, what did play a

1 role? There must be some explanation for legislative
2 boundaries that needlessly move massive numbers of Wisconsin
3 residents from one district to another, disenfranchised nearly
4 300,000 voters, for the first time placed Kenosha and Racine,
5 the cities in the same district, and it has weakened the
6 ability of Latinos in Milwaukee's South Side to elect a
7 representative of their choice.

8 Other than Dr. Gaddie, no one involved in the actual
9 redistricting process came into the courtroom to defend or
10 explain what they did and why, to justify the radical change in
11 the legislative districts wrought by Act 43. Whether or not
12 they used the phrase "safe harbor," the defendants seek it
13 here. But they seek a safe harbor from the application of the
14 Equal Protection Clause. Under the case law, there is a
15 presumption of validity, but even if there is such presumption,
16 there must be at least a rational basis for any legislation
17 and, no less, legislation such as Act 43 that affects the
18 democratic process. Given the secretive process that sought to
19 shield from the public and from the minority party what should
20 have been an open and public process, we do not believe Act 43
21 should receive any presumption of validity.

22 Getting directly to the constitutional violations at
23 issue here, other than the Section 2 claims, I'd first like to
24 address the lack of core district retention that was forced by
25 the population movements. Could I have Exhibit 55 up on the

1 screen, please, and Exhibit 2.

2 As Dr. Mayer testified, with Assembly District 24 --
3 could we have that highlighted -- the total population shift
4 was 25 times larger than necessary to equalize the population.
5 There's no explanation justifying the large population shift in
6 that district. In Assembly District 60 -- could we bring that
7 up -- only ten people needed to be moved to equalize the
8 population in that district. As Dr. Mayer testified you didn't
9 need to move anyone because that is essentially equal
10 population. Nevertheless, Act 43 moved 17,594 people into the
11 district and 17,643 out. That's more than 700 times the number
12 of people that needed to be moved to equalize population.
13 There is no explanation justifying the massive shift there.

14 Could we look at Assembly District 97, please. In
15 Assembly District 97 they only needed to move 145 people into
16 the district to equalize the population. Instead, they moved
17 20 people out of the district. In other words, they moved that
18 district further away from population equality rather than
19 closer to population equality, and to do that, they moved 1,353
20 times more people than was necessary.

21 Now, the Court will not find in the record any
22 explanation for this massive population shift that actually
23 took place in this district and took this district further away
24 from population equality. All we have are general references
25 to ripple effects statewide.

1 The same thing can be said for the Senate districts.
2 Could we have Exhibit 3, please, from Dr. Mayer's report. In
3 Senate District 2, there were 286 people below population
4 quality. They could have left it alone and done nothing.
5 Instead they moved 49,705 people in and 49,291 people out.
6 That's more than 346 times the number of people necessary who
7 had to be moved into that district. There's no explanation
8 justifying that large population shift.

9 Senate District 17, they only needed to subtract 58
10 people. Instead, they added 159, again moving that district
11 farther away from population equality, and to achieve that they
12 moved 19,666 people into the district, 19,507 out, 675 times
13 the number of people that needed to be moved. Again, no
14 explanation justifying the massive population shift there,
15 especially when it moved the district further away from
16 population equality.

17 Could we see Senate District 21, please. In
18 District 21, they needed to add 5,598 people. They moved
19 72,431 in and 66,842 out. And as your Honors will recall, I'll
20 put up on the screen in a minute, that's the Kenosha, involves
21 the Kenosha and Racine districts. That's 25 times more people
22 than were necessary than to equalize population.

23 In Senate District 22 they needed to subtract 7,749
24 people. To do that, they moved 66,837 people in, 74,586 out.
25 That's 18 times more people than necessary to achieve

1 population equality.

2 And what essentially happened -- and could we have
3 Exhibit 178 up on the screen, please. What essentially
4 happened is that they radically reconfigured Senate Districts
5 21 and 22 in a way that they never had previously been
6 configured and they created these newly configured districts in
7 the process. Now, this was a massive shift in the two
8 districts. The only evidence that the Court will find in the
9 record, either in testimony live before the Court or in the
10 depositions when the Court reads those, the only evidence the
11 Court will find for radically reconfiguring these districts in
12 this way is some general deposition testimony about supposedly
13 reuniting the cities of Racine and Kenosha. But as
14 Representative Barca testified, this was not a reunification,
15 because these cities never had been joined in this way in this
16 configuration, and as a lifelong resident of the city of
17 Kenosha, Representative Barca testified these two Downtown
18 areas, these two urban areas are not, in fact, a community of
19 interest.

20 Dr. Mayer similarly testified about his familiarity
21 with the city of Kenosha having testified in a local
22 redistricting case down there in October and November, and he
23 too agreed, these are not a community of interest for
24 districting purpose. The Court will not find any evidence that
25 the people who live in the areas joined together in newly

1 configured District 22 were consulted before this was done to
2 be asked if they considered themselves to be a community of
3 interest that should be configured in this way, nor did anyone
4 involved in this process, including Dr. Gaddie, because he
5 wasn't involved in Racine and Kenosha. No one came before you
6 to explain why this was done.

7 Now, along with these massive population shifts came
8 massive disenfranchisement. Could we have Table 28 from the
9 pretrial report, please. If we look at Senate District 21,
10 again, 72,431 people were moved in from Senate District 22 as
11 you can see depicted there. These voters -- these voters were
12 moved into Senate District 21 in this massive reconfiguration.
13 They lost all their right to vote in the 2012 regular
14 elections.

15 Senate District 27, that district needed to lose
16 25,541 people. Instead 69,372 people were moved in and 94,797
17 people were moved out. The number of people who moved into
18 Senate District 27 from an even district numbered approximately
19 50,000. As you can there, the number's actually 49,867.

20 Now, none of those people will be able to vote in a
21 recall election. So even if you were to credit the idea that
22 voting in a recall election may be considered the equivalent of
23 voting in a regular election, and Dr. Mayer's testimony is that
24 it is not going to be equivalent, these 50,000 people are
25 disenfranchised needlessly. The Court will not find any

1 justification for the massive population shift in this district
2 either.

3 Finally, I'd like to come to count 9, which is our
4 count for the recall elections, and Judge Stadtmueller
5 mentioned this yesterday. I want to address first the
6 sovereign immunity that's been raised. I know Judge Dow had
7 asked about it initially, I think in our pretrial conference,
8 and there's been an argument that this claim is barred by
9 Pennhurst.

10 Well, before you even get to the Pennhurst analysis,
11 there's a question that you have to go through first, an
12 analysis. That's the analysis under Ex parte Young. We argued
13 in our trial brief. The Court will see it in another brief
14 that we filed today responding to the summary judgment motion
15 that the Government Accountability Board filed.

16 Now, under Ex parte Young, the question is whether
17 there is an allegation of an ongoing violation of federal law.
18 It's the first prong, and the second prong is whether there has
19 been a request for prospective relief.

20 Could I get the Elmo brought up, please. I'd like to
21 put before your Honors a case. This is Verizon Maryland, Inc.
22 versus Public Service Commission of Maryland. The cite is 535
23 U.S. 635. We do cite this in one of our briefs. The
24 United States Supreme Court is very clear that in determining
25 whether the doctrine of Ex parte Young avoids an Eleventh

1 Amendment bar to suit, the court need only conduct a
2 straightforward inquiry into whether the complaint alleges an
3 ongoing violation of federal law and seeks relief properly
4 characterized as prospective. That's all that needs to be
5 done.

6 The U.S. Supreme Court also makes clear that the
7 inquiry into whether the suit lies under Ex parte Young does
8 not include an analysis of the merits of the claim. In the
9 parenthetical the Supreme Court writes an allegation, an
10 allegation of an ongoing violation of federal law is ordinarily
11 sufficient. Here the plaintiffs' in their count nine allege an
12 ongoing violation of federal law and they seek prospective,
13 injunctive and declaratory relief to end those continuing
14 violations of federal law.

15 Could I have Exhibit 12 brought up, please. Please
16 go to paragraph 94. Now, this was the answer to the
17 plaintiffs' second amended complaint. This was the one that
18 was filed around November 25th. In answering paragraph 94, the
19 Government Accountability Board alleged in its answer that
20 elections conducted under the 2002 districts, quote, "will
21 deprive the individual plaintiffs of their civil rights under
22 color of state law in violation of 42 USC Sections 1983 and
23 1988. We alleged it, the plaintiffs alleged it. It's alleged
24 right there in paragraph 94, and the defendants alleged it too
25 in their answer.

1 Could we go to paragraph 100, please. In
2 paragraph 100, the plaintiffs allege the challenged 2011
3 districts cannot serve as districts for any future elections,
4 whether regular, special or recall elections, unless and until
5 this Court rules on the constitutionality of the districts, and
6 the defendants denied that.

7 And could we see paragraph 100, please. In
8 paragraph 100 -- I'm sorry, did I -- 101, apologize.

9 Paragraph 101 alleges that the 2002 districts are the only
10 legal, valid and proper districts for any election prior to
11 final disposition of this case, that was denied.

12 And finally, could we go to the request for relief in
13 paragraph 4. It's actually not the affirmative defense. It's
14 further down. The request for relief. It's a couple of pages
15 after. Paragraph 4. The defendants themselves ask that this
16 Court declare and establish the election district boundaries
17 under which the defendants should conduct the recall and
18 special elections prior to the regular, primary and general
19 2012 elections. Now, again this was the original answer.

20 Could we go to the amended answer. That's
21 Exhibit 12A. Now, if your Honors remember, I did pull this up
22 yesterday. Could we go to paragraph 94 again. Went through
23 this yesterday and walked through this with Mr. Kennedy.
24 Paragraph 94. As the Court can see, there's an allegation of
25 violation of civil rights under color of state law and there's

1 a denial. The defendants lack knowledge and information
2 sufficient to form a belief as to whether any elections
3 conducted under those boundaries will deprive any of the
4 individual plaintiffs of their civil rights and deny it. We
5 have an allegation of a violation of a federal right. We have
6 a denial of a violation of a federal right.

7 Could we go to paragraph 100. 100, again, we have
8 the challenged 2011 districts cannot serve as districts for any
9 future elections, whether regular, special or recall elections,
10 unless and until this Court rules on the constitutionality of
11 the districts. We have a denial.

12 And then paragraph 101, the allegation is that the
13 2002 districts are the only legal, valid and proper districts
14 for any election prior to final disposition of this case.
15 Again, this is under federal law, and there is a denial there.

16 And then finally could we look at Request No. 4 for
17 relief again. And here we have a request for relief saying if
18 the Court determines that the GAB's compliance with Act 43,
19 Section 10(2) will violate any law with regard to the
20 allegations herein, again, including federal law, they're
21 asking the Court to declare and establish the election district
22 boundaries under which the defendants should conduct the recall
23 and special elections prior to the regular, primary and general
24 2012 elections. We had both an allegation of a violation, a
25 continuing violation of federal law, as well as a request for

1 prospective relief.

2 Now, in addition we have a stipulation. One or more
3 of the plaintiffs has filed a recall petition. Could we have
4 paragraph 98 of the final pretrial report pulled up, please.
5 This is a stipulated fact and at least one plaintiff has signed
6 a State Senate recall petition. Relying on the general
7 Government Accountability Board's determination that the 2002
8 districts will govern the recall elections, the GAB's stated
9 intention that it will conduct the recall elections under the
10 2002 districts and it's refusal to stipulate or admit that it
11 will not be violating the plaintiffs' federal constitutional
12 rights in doing so. We've had a couple of denials of that
13 stipulation now. The Court put it to Mr. Kelly the other day.
14 I put it to the defendants today. They refused to stipulate
15 that that right that this plaintiff has, one or more plaintiffs
16 has, will not be violated, the constitutional rights will not
17 be violated by using the districts. That's been denied. They
18 won't enter into that stipulation that joins issue in this case
19 whether the use of the 2002 districts will violate the
20 plaintiff's federal constitutional rights, and in addition the
21 Baldus plaintiffs believe that the Court has continuing
22 jurisdiction over the districts that this Court drew in 2002
23 such that if their continuing use does violate the federal
24 constitution, this Court's jurisdiction over count nine is
25 proper and is appropriate.

1 Now, even if we were to overcome all of that and
2 naturally reach the application of the Pennhurst doctrine, we
3 believe that the defendants have waived their right to
4 sovereign immunity here under Pennhurst. Now, the defendants
5 simultaneously argue that they raised sovereign immunity
6 multiple t motion as they had strategic reasons for not raising
7 it earlier.

8 Now, the defendants cannot have it both ways. They
9 first raised sovereign immunity in their February 10, 2012
10 summary judgment motion in brief. The Court will not find any
11 reference to it in the serial answers that the defendants filed
12 in their August 4th, 2011 motion to dismiss or in any other
13 pleading in the eight months of this litigation.

14 And I believe that they've argued that they've
15 reserved the right to assert by incorporation one of the
16 intervenor defendants' defenses. That is not the same thing as
17 affirmatively raising waiver under the Pennhurst doctrine under
18 sovereign immunity in their affirmative defenses. The
19 defendants' belated assertion of the sovereign immunity and
20 their conduct throughout this litigation is proxy to waiver of
21 any such right.

22 Now, waiver has been found when the state's conduct
23 during the litigation, quote, "clearly manifests acceptance of
24 the Federal Court's jurisdiction or is otherwise incompatible
25 with an assertion of an Eleventh Amendment immunity," and that

1 comes from a case Hill versus Blind Industries and Services of
2 Maryland. The cite on that is 179 F. 3d 754, 9th Circuit 1999.
3 We have -- in our briefs we've identified the Hill case for the
4 Court. We believe that it provides persuasive authority that
5 should be applied here.

6 Could I have the Elmo brought up, please. In the
7 Hill case, the 9th Circuit said when an Eleventh Amendment
8 defense is first raised late in the case, the record may be
9 inadequate to permit informed appellate review, and the
10 plaintiff may have difficulty obtaining evidence necessary to
11 oppose the motion. A party may gain an improper advantage
12 through this tactic even without waiting until the first day of
13 trial. The ruling on a motion for summary judgment, or on
14 pretrial matters such as motions in limine, can signal the
15 probable outcome of the case. The integrity of the judicial
16 process is undermined if a party, unhappy with the trial
17 court's rulings or anticipating defeat, can unilaterally void
18 the entire proceeding and begin anew in a different forum. The
19 rules of procedure in federal courts are structured to prevent
20 such abuses. Defects in personal jurisdiction, venue or
21 service of process are waived unless asserted in a party's
22 initial pleading. The 9th Circuit continues on.

23 I think I have the wrong copy of the case. Excuse
24 me, your Honors. I think I have the wrong copy of the case.
25 It's okay. We'll just make do. Your Honors, we will -- oh,

1 there we go, okay. I don't have it highlighted but I do have
2 it. It's up at the top. A waiver of the Eleventh Amendment
3 immunity has been found when the state's conduct during the
4 litigation clearly manifests acceptance of the federal court's
5 jurisdiction or is otherwise incompatible with an assertion of
6 Eleventh Amendment immunity. And the Court goes on and the
7 Court can pull the case and the Court can read the case and I
8 certainly hope that it will.

9 The quote that I was looking for is the 9th Circuit
10 said timely disclosure provides fair warning to the plaintiff,
11 who can amend the complaint, dismiss the action, refile it in
12 state court, or request a prompt ruling on the Eleventh
13 Amendment defense before the parties and the court have
14 invested substantial resources in the case, and it continues
15 on.

16 Now, the defendants admit that their failure to raise
17 sovereign immunity until February 10th was motivated by
18 strategic reasons. Could we have the defendants' brief in
19 response to the plaintiffs' trial brief brought up, please.
20 Could we go to page 7, please, footnote four. If we look down
21 about the one, two, three, fourth -- the fourth line up, the
22 fourth line up from the bottom -- just go ahead and highlight
23 that line. Clearly there are strategic reasons for not filing
24 a motion to dismiss after plaintiffs filed their second amended
25 complaint and have nothing to do with an intent to waive

1 sovereign immunity. Strategic reasons, clearly strategic
2 reasons.

3 Now, we know they could have done it. We know they
4 could have raised the issue when they did because the
5 intervenor defendants filed a motion for judgment on the
6 pleadings against the Baldus plaintiffs' second amended
7 complaint in early December and they included a footnote citing
8 to the Pennhurst case. There were strategic reasons for doing
9 it and we saw those the other day, yesterday, as a matter of
10 fact, when I was examining Mr. Kennedy.

11 We saw that on November 25th there was an answer
12 filed to the Baldus plaintiffs' complaint that we saw, and this
13 was Exhibit 17. Just a couple of days later Waukesha County
14 complaint was filed by co-counsel, the counsel for the
15 Government Accountability Board, that asserted a constitutional
16 violation allegation with respect to the recall districts, and
17 then we saw just a day or two later that the amended answer --
18 the answer was amended in this case to try to remove the
19 allegation of a constitutional violation from the answer to the
20 second amended complaint. Clearly there was a strategic move.
21 And then the Pennhurst doctrine wasn't raised formally to this
22 Court until February 10th, a couple of months later.

23 This is a case, we believe, of collusive forum
24 shopping to attempt to maneuver into state court the resolution
25 of an issue that was pending before this Court and then for

1 strategic reasons a determination not to raise the Eleventh
2 Amendment defense until days before trial.

3 And then finally, I think that we've established
4 pretty conclusively there is a case in controversy here as to
5 claim nine. The -- we've seen that the Government
6 Accountability Board through Mr. Kennedy's testimony yesterday,
7 it's their clear intention to use the 2002 districts and
8 plaintiffs have no reason to doubt their sincerity. There's no
9 dispute as to what Act 43 actually says about when it applies.
10 But again, what the defendants will not say is that maintaining
11 the 2002 boundaries for the pending recalls is constitutional.
12 And that, therein lies the controversy.

13 So the question is one of federal constitutional law.
14 Does the effective date of Act 43, which necessitates the 2002
15 district boundaries remain in place until the 2012 general
16 election, comply with the constitutional mandate of one person,
17 one vote. Now, the mandate necessarily includes resolution of
18 this question. The Court need not enter an injunction that the
19 Government Accountability Board comply with Act 43 which would,
20 in the absence of waiver implicate Pennhurst. Instead, the
21 plaintiffs only request that declaratory relief that compliance
22 with the statutory effective date of Act 43 is constitutional.

23 On behalf of the Baldus plaintiffs, I thank your
24 Honors for your time and attention and we respectfully request
25 that you enter judgment in our favor.

1 JUDGE STADTMUELLER: Thank you, Mr. Poland.
2 Mr. Kelly?

3 MR. OLSON: May it please the Court, I'm Jim Olson
4 and I'm from Lawton & Cates and I'm one of the attorneys
5 representing the intervenor plaintiffs. I'm going to be
6 speaking on behalf, asking the Court to find Act 44
7 unconstitutional.

8 Act 44 was really written by one man by the name of
9 Andrew Speth. When asked what he used to determine the
10 boundaries for Act 44, Mr. Speth said zero deviation. We then
11 asked him are you familiar with a term "core retention." He
12 said no. We explained the term to him and then he said, no,
13 I didn't use that. All I used was zero retention -- or zero
14 deviation.

15 Now, zero deviation, of course, is important, one
16 man, one vote, but zero deviation by itself does not assure
17 that there will be fair and effective representation. That
18 requires looking at the traditional principles that have
19 applied to redistricting: Core retention, compactness, and
20 community of interest.

21 Now, would you bring up Exhibits 1014 and 1015,
22 please. These are the maps. On the left is 1014. These are
23 the congressional districts in the -- before Act 44; on the
24 right are the congressional districts after Act 44. And you
25 can see on the left that the districts were about as compact as

1 they could be, whereas on the right they changed considerably.

2 Now, to get zero deviation, anybody really can get
3 zero deviation. It doesn't take much. It just takes a
4 computer and you can come up with any number of plans which
5 will show zero deviation, and all you really need to do when
6 it's done is you get the districts fairly close and then you
7 rearrange things on the boundaries.

8 And if you look at these maps closely, you can see
9 that there are a few places where the maps have been rearranged
10 a little bit so you can get a few counties -- or until you get
11 a few townships brought in and you bring a few thousand people
12 in and a few thousand people out; and, in fact, that was what
13 was done in 2002. Here we have Clark County, and if you look
14 at it closely, there's an upper tier of towns that are brought
15 in and then there's a little squiggle up there, which means
16 that another town had to be brought in to make it zero
17 deviation.

18 Now, when it came to this year, what happened was
19 that there were changes in the boundary. District 7 was
20 underpopulated by about 21,000, and District 3 was
21 overpopulated by about 19,000. So the numbers were relatively
22 close, and the logical thing to do would have been the
23 Clark County solution again. Move Clark County into District 3
24 and if there were any problems, if you still didn't get quite
25 exactly, and Mr. Speth said, well, there still would be a

1 couple thousand off, it would have been very easy to have moved
2 just a few townships and you would have achieved zero
3 deviation.

4 Now, if that had been the case, each of the 3rd and
5 the 7th would have had about 99 percent core retention. But
6 instead what was done instead of the Clark County solution was
7 a massive redrawing of the boundaries between 7 and 3. This
8 gold area is 3 and you can see that it starts over at the
9 Mississippi River, winds around, goes below a few counties,
10 circles back up north and goes east to take in Portage County
11 over on the Wisconsin River.

12 This was a massive redistribution. There were
13 190,000 people that were moved from the 3rd out of the 3rd and
14 171,000 were shifted in, and in the 7th it was -- all they
15 needed to shift was 21,000 and 171,989 were shifted in and
16 150,000 shifted out. So there was a massive change in the
17 populations of who were voting in these two districts.

18 And the biggest change really came over here on the
19 east. I'm pointing now to Portage County. Portage County has
20 the city of Stevens Point. Portage County has been in the 7th
21 Congressional District at least for 75 years. We have
22 Exhibit 205, and Exhibit 205 are the bluebooks since 1935, and
23 Portage County has always been in the 7th Congressional
24 District.

25 Wood County right next to it contains the cities of

1 Wisconsin Rapids and Marshfield, and Wisconsin Rapids and
2 Marshfield have also been in the 7th Congressional District for
3 at least 75 years, and only a small portion of the lower part
4 of Wood County has ever not in the 7th Congressional District,
5 and that was because it had equalized its boundaries with what
6 was then the 6th.

7 So what has happened is this area that I'm circling
8 now and which has been over here -- you can see it's really a
9 nice square box area -- was broken up and an area which had
10 really been for 75 years in the 7th Congressional District was
11 now split up.

12 Now, let's -- could I have the next map on the board.
13 Okay. I have a couple of highway maps, because I think these
14 really show the community of interest better than the other
15 maps. On the left is an enlargement of Wood County, Marathon
16 County and Portage County, and as you can see it's a compact
17 box. Now, starting up around here in Rhinelander, we have the
18 Wisconsin River, and the Wisconsin River flows down through the
19 7th Congressional District, it flows through Wausau, through
20 Stevens Point and through Wisconsin Rapids.

21 And this has had a tremendous impact on the area
22 because there are paper mills, there are hydro dams, there's
23 recreational area up here, there's Lake Dubay, which is in
24 the -- on the Wisconsin River, and Lake Dubay controls the
25 water levels. And with all these different aspects are things

1 that are important to a representative, because there are water
2 quality problems, there are air quality issues, there's
3 recreational issues. Some of these are controversial and the
4 representative has to know about all of these issues.

5 There is an airport around this area, the Central
6 Wisconsin Airport, which serves this community of interest.
7 You can see the highway. I don't know whether highways follow
8 communities or communities follow highways, but regardless,
9 when you have a highway -- this is Interstate 39 that goes
10 right through -- that really helps define the community of
11 interest. Yet Portage County and a good share of Wood County
12 were wrenched out of this area and placed over in the 3rd
13 Congressional District.

14 Now I want to look at this little larger highway map,
15 and particularly let's go up here. And this is
16 St. Croix County up in this area, and as you can see, St. Croix
17 County is very close to the Twin Cities, so you have a whole
18 different dynamic with St. Croix County. Furthermore, St.
19 Croix County has grown 33 percent in the last ten years. So
20 it's a large county as far as growth is concerned and it has a
21 number of issues which obviously relate to the Twin Cities
22 area. Yet that, that area, St. Croix County, which has never
23 been in the 7th Congressional District, has been taken out of
24 the 7th congressional district and moved over into the 3rd
25 Congressional District.

1 So you have St. Croix County, which is part of the
2 Mississippi River Valley watershed, which is no longer voting
3 in that area and moved into the Wisconsin River Valley
4 watershed. And likewise, you have Stevens Point where the
5 Wisconsin River flows right through and Wisconsin Rapids, they
6 have been moved into a district which is primarily the
7 Mississippi River Valley area.

8 In addition, you can look at the roads. You have
9 Interstate 94 and Interstate 90 which flow through the
10 3rd District, connecting the various communities of interest in
11 the 3rd District, where as you have Highway 39 connecting the
12 areas in the central Wisconsin area.

13 So as far as -- then can we go back to the other maps
14 just for a second? As far as the 8th Congressional District,
15 which is up here, and that only had a 4,000 person under
16 population. All that was needed to make that area a zero
17 deviation was to add 4,000 people from the adjoining district;
18 and as you can see in this map, there was quite a few changes
19 and they did move it south somewhat. So what this shows is
20 that really for three-fourths of the state, very little,
21 in fact, almost nothing had to be done in order to make the
22 areas back to equal population.

23 Now, what's important in this case is effective
24 representation and how do these concepts relate to effective
25 representation. And in our materials there is an affidavit

1 from Congressman Dave Obey, who represented the
2 7th Congressional District for 41 years, and that attests to
3 the fact that he was an effective representative being
4 reelected that many times. Furthermore, he held the leadership
5 position in Congress, and furthermore, he was deeply involved
6 in the redistricting process all the time he was in Congress,
7 and he has indicated how the concepts of core retention and
8 various things like community of interest and compactness are
9 important.

10 The poor representative now up in the
11 7th Congressional District has to travel all the way from
12 St. Croix County all the way over to Florence County, about a
13 five-hour drive. It adds a good hour to the commute time. The
14 poor people in Florence County are not going to get to see
15 their representative that much, and there are reasons that a
16 representative should actually go to the areas. So the
17 compactness of the area has been greatly increased, and that
18 affects effective representative.

19 Also the media markets. There's a central Wisconsin
20 media market around Wausau and that's important, but now you
21 have St. Croix County in there and that's going to bring in the
22 very expensive Twin Cities media market, which is expensive
23 both for campaigning and also for getting the word out to
24 people.

25 And so we agree that zero deviation is important but

1 zero deviation could have been achieved very easily. There's
2 never been any explanation as to why they had to move all these
3 people. It was not consistent with compactness, it was not
4 consistent with core retention, and it certainly wasn't
5 consistent with community of interest.

6 And so, your Honors, on behalf of the plaintiff
7 intervenors, we would like to ask that Act 44 be thrown out
8 because it does not comply with what is necessary for effective
9 representation. Thank you.

10 JUDGE STADTMUELLER: Thank you, Mr. Olson.
11 Mr. Shriner?

12 MR. SHRINER: May it please the Court, I started out
13 with a question with respect to the challenge to Act 44, which
14 is being maintained by the intervenor plaintiffs, the
15 plaintiffs having dismissed their Act 44 claims last night,
16 asking what's the claim. It started out being a political
17 gerrymandering claim. We moved back in early December to
18 dismiss that claim, moved for judgment on the pleadings as to
19 the plaintiffs' claim, moved to dismiss the Democratic members'
20 claims as I'll refer to them. We've joined issue on that. We
21 suggested that the familiar case law, Vieth versus Jubelirer
22 and the LULAC case from Texas, U.S. Supreme Court cases from
23 the last decade, most recently applied in the two Illinois
24 District Court decisions upholding both the state and the
25 congressional redistricting laws in Illinois. So we don't need

1 to go far to figure out how they apply to modern life.

2 They showed that plaintiffs had a political
3 gerrymandering claim, had a burden to show that there was a
4 manageable judicial standard by which to judge whether what
5 happened in the redistricting was excessively political. The
6 Supreme Court has never found a standard that meets a
7 judicially manageable standard.

8 I always think of this as being like the jump that
9 took us into -- took us from the political thicket that nobody
10 could go into to Baker versus Carr. The secret to having a
11 constitutional claim there was that there was a judicially
12 manageable standard. When the Court finally decided it would
13 go into that thicket, it did so because you could take a number
14 and divide it by eight in our case and say that's the number.
15 It's a judicially manageable standard. That's what the
16 Supreme Court has said you have to have for a political
17 gerrymandering claim is a judicially manageable standard, and
18 the Court has said that the plaintiffs have the burden of
19 pleading it, proving it. Here they didn't plead it. We called
20 them on that at the briefing. We got a suggestion in the
21 response brief that a standard could be something having to do
22 with core retention and basically justifying every deviation
23 from a least change. We responded to that in our reply
24 briefs -- the briefs are before you, I'm sure you can look at
25 them -- why we think that doesn't meet the test.

1 That's the last we've heard about that claim. The
2 plaintiffs have put on nothing. They've said in their briefing
3 that they would on proof to support the judicially manageable
4 standard that they propose, which we didn't think was one. We
5 never heard about it again from the plaintiffs.

6 The defendants -- or the Democratic members have
7 expressly repudiated that. They filed a brief for this Court
8 the other day, document number 171, their response to the GAB
9 defendant's motion for summary judgment, in which they say on
10 page 5 that the intervenor plaintiffs do not rely on political
11 gerrymandering as a basis for rejection of Act 44. Rather,
12 Act 44 is unconstitutional they say under the Equal Protection
13 Clause since it deprives voters of the 3rd, 7th and 8th
14 Districts of fair and effective representation. That's what
15 they say. There certainly has been no proof of anything in
16 this respect. So what's left? What have we got here with
17 respect to the challenge to an act of the Wisconsin
18 legislature? It seems to me that what we need is a
19 constitutional basis for challenging.

20 I noticed that my friend in his interesting
21 presentation of the delights of the Wisconsin River Valley and
22 what's the matter with this map never once mentioned the
23 U.S. Constitution or a provision of the U.S. Constitution that
24 made it necessary for the Court to -- for the legislature to
25 take into consideration compactness or community of interest or

1 core retention. They're not in the Constitution. There has
2 never been a case saying that the Constitution imposes a burden
3 on legislatures to use those methods.

4 Rather, there's been a recognition in all of the
5 cases, in the U.S. Supreme Court cases, that redistricting is a
6 political act engaged in by politicians, that there is nothing
7 wrong with a redistricting that is politically driven. There
8 is nothing wrong with it at all and I feel no shame about
9 standing before you and telling you that this was a
10 redistricting that was done by politicians.

11 Now, it turns out that the politicians who actually
12 made the decisions on this -- sure, the legislature voted for
13 it and passed it -- the decisions were actually made by the
14 incumbent congressmen, as it has -- as has happened, as
15 Mr. Olson's friend, former Congressman Obey, tells us in his
16 affidavit, which is in the record, it has always happened that
17 way in Wisconsin for as long as he can remember. The
18 congressmen get together and they decide what should be done
19 with the map of the congressional districts and the legislature
20 passes it. That's the evidence.

21 There's a very clear set of evidence here about how
22 this map was drawn. There isn't any secret about it all. It's
23 in the stipulation we've submitted. The stipulation that we've
24 submitted tells you where you can find it, starting at
25 paragraph 7, which tells you the -- something on the order of

1 40 paragraphs of stipulated facts, then going through the trial
2 exhibits that you can look at, and then submitting
3 Congressman Obey's affidavit, but also the testimony offered in
4 lieu of testimony by Mr. Andy Speth, chief of staff to
5 Congressman Ryan who actually sat down at the computer and
6 carried out the directions to draw the map of the congressional
7 districts in Wisconsin, and he tells you exactly how it was
8 done. He told the plaintiffs this in his deposition a long
9 time ago exactly how this was done.

10 And what's the story he tells? He says, first of
11 all, what the process was was that this is how it was always
12 done. The congressmen talk together, and he tells about the
13 conversations that Congressman Ryan had with Congresswoman
14 Moore, what did she want; with Congresswoman Baldwin, what did
15 she want; with Congressman Kind, what did he want; with the
16 other Republican congressmen.

17 There's always been a tradition, which Mr. Obey talks
18 about in his affidavit. In the past it's been Congressman Obey
19 for the Democrats and Congressman Sensenbrenner for the
20 Republicans. This time around it was Congressman Kind for the
21 Democrats and Congressman Ryan for the Republicans, and they
22 decided how the redistricting ought to be done and the
23 legislature agreed. There is nothing wrong with that. That is
24 perfectly legitimate.

25 The U.S. Supreme Court said that if this is seen as

1 a -- as a decision that favors the incumbent congressmen, that
2 that's perfectly legitimate, that's perfectly rational of the
3 legislature. Mr. Olson mentioned the great seniority that
4 Congressman Obey built up that allowed him to become chairman
5 of the Appropriations Committee, which a rational legislator in
6 Wisconsin might well decide works to the benefit of the state
7 of Wisconsin. Congressman Sensenbrenner's the chairman of the
8 judiciary. Congressman Ryan's chairman of the budget. There's
9 a long history. Congressman Steiger was a committee chairman
10 before that, Congressman Laird, Congressman Aspen. And that's
11 something that is perfectly rational for the legislature to
12 decide to do.

13 Mr. Speth explained how he went about doing it, and
14 you'll find that in this stipulation. He told us how he
15 started. He said, as Professor Mayer said would be a sensible
16 way to strawing drawing any map in Wisconsin, he started in
17 Milwaukee. He started in Milwaukee because, first of all, it's
18 the county which has the largest minority population, so one
19 has Voting Rights Act issues in Milwaukee County one has to
20 take care.

21 But for another reason he had to start in the
22 Milwaukee-Madison corridor because Milwaukee County or the city
23 of Milwaukee, largely Milwaukee County, the 4th Congressional
24 District represented by Congresswoman Moore had the biggest
25 need to gain population. It's the city district, the urban

1 district and it needed to gain the most substantial number.
2 Congressman Baldwin, who represents Madison, had the most to
3 give up.

4 Now here's the problem. Those two districts aren't
5 next to each other. The 2nd District and the 4th District
6 aren't next to each other. The 5th is in between. You've got
7 to take this whole idea of least change. You know, you take
8 Clark County and drop it into the 7th instead of being in the
9 3rd and that takes care of the problem. That isn't the way the
10 world works, and Mr. Speth explains how he did, what he did and
11 why he did it.

12 Generally speaking, the three congressional districts
13 across the bottom of the state, the first in Kenosha, the
14 second in Janesville, the third over in the southwestern corner
15 of the state, needed to lose population and the other five
16 needed to gain. Well, the 8th District isn't next to any of
17 those. The 8th District up in the Green Bay area isn't next to
18 any of those. So you've got to move things through, and when
19 that happens, people's interests are engaged and each of them
20 chimed in -- and again, this is in the record, you can look at
21 it, you can see it -- what people wanted.

22 Congressman -- let me start with the three Democrats,
23 the intervenor plaintiffs who Mr. Olson represents. Did they
24 want something? Yes. Did they get what they wanted? Yes.
25 Congresswoman Moore, who had to gain, didn't want to gain from

1 the southern suburbs of Milwaukee County. She has the city of
2 Milwaukee. She wanted the North Shore suburbs which vote
3 Democrat and contribute heavily to Democratic candidates.

4 Congresswoman Baldwin said she didn't want to have
5 such a spread-out district. She wanted to have it more
6 compact. Particularly she wanted to get rid of Jefferson
7 County, which was full of Republicans, and she got her way.
8 Congressman Kind wanted to have Fort McCoy in his district, and
9 so he got his way. Other congressmen had other concerns.

10 But as these things moved around, there is an
11 explanation, Mr. Speth gave it, for why the moves were made,
12 not why every line was drawn. Nobody looks at a legislative
13 map and subjects it to that level of scrutiny. The
14 Constitution doesn't require it. It's inconsistent with the
15 function of a court.

16 But what happened here is these were moved around for
17 reasons. They were reasons that were political, they were
18 reasons that reflected communities of interest, they were
19 reasons that reflected compactness, not in some technical sense
20 of least circle or whatever you call it, but in the sense that,
21 you know, the 4th District is very compact, the 5th District is
22 compact, the 1st District is compact. When you get up North,
23 you can't be compact. There are a lot more people than
24 trees -- or trees than people up there. You cannot make the
25 northwest corner of Wisconsin a compact district. You cannot

1 make the 8th District compact. You cannot make the
2 3rd District compact. It's just way spread out.

3 And where you draw the lines, is it affected by
4 politics? Sure. Did Congressman Duffy, recently elected to
5 replace the very effective Congressman Obey, Congressman Duffy,
6 a Republican, replacing Congressman Obey after 41 years, did he
7 want to have a more Republican district? Yes. He had a
8 majority Democratic district and he wanted to have a more
9 Republican district. He wanted his district to come down some.
10 Is Congressman Kind weeping crocodile tears because he had to
11 take a bunch of Democrats?

12 Well, we've got some indication of that, and again,
13 it's in the record, because one of the things that went on is
14 that the Democrats were asked and made to give what map they
15 would have wanted. You'll find this in Exhibit 43B. It's in
16 the record. It's a nice colored map, and if you follow the
17 black lines on there, you'll see that the districts that the
18 Democratic congressmen wanted.

19 Well, what did they want? My Lord, don't ever break
20 up Wood, Portage and Marathon Counties you think? Well, yeah,
21 put Wood County, they suggested, down in the 3rd District,
22 which is what happened, and we're now told that it breaks up
23 the community of interest for the Wisconsin River.

24 St. Croix County, with all the Republicans in the
25 Twin Cities suburbs, ends up in Duffy's county. Well, is --

1 Duffy's district, the 7th District. Does that make Duffy
2 happy? Yes. Does that make Kind happy? Yes. It's in the
3 record. It's in the record where staff members are going back
4 and forth, we're happy about this. You know, we got
5 Portage County and they had to take St. Croix. So that's how
6 it was done. There's nothing wrong with it. It's not
7 unconstitutional. The very notion that it's unconstitutional
8 in our system is ridiculous.

9 So -- and again, I suggest that you read our briefs.
10 I don't want to repeat all the arguments we've made. All the
11 arguments that are made here really are not core retention, why
12 did you move more than you had to move, and I've explained part
13 of the reason. It's just simply the process of moving things
14 around.

15 But another part of the reason is there isn't any
16 magic about 20 -- or 10 years ago's congressional districts.
17 The legislature in 2002 decided that the congressional map of
18 Wisconsin ought to be drawn a certain way. The legislature in
19 2011 came to a different conclusion. So what? That's not a
20 violation of the Constitution. It's not even bad policy.

21 So what if some of Congressman Obey's political base
22 ends up in the 3rd District and some in the 7th District? It
23 doesn't make any difference. I used to live in the 9th
24 District and then we ended up with the 8th and ten years ago I
25 moved into the 5th District. I liked it fine and now I'm going

1 to be in the 4th District. You know, I wake up in the morning
2 and I'm just as happy, the life goes on. It really doesn't
3 have anything to do with. It doesn't affect any of the rights
4 of the people.

5 It isn't -- you know, there's this trope that
6 everybody uses, including the social scientists, about moving
7 people, moving too many people. People don't move. This isn't
8 about somebody having to move out of the house or have a line
9 drawn down his street so that the congressional district is on
10 one side or the other. You know, the Wisconsin River Valley
11 might be better off with two congresspeople looking after its
12 interests. That's something that is perfectly rational for a
13 legislature to conclude.

14 So, you know, I get back to the point at the end that
15 in our system the legislatures make the laws. They do it with
16 politics. That's how legislatures work. And, you know,
17 redistricting is about as political as anything could be, as
18 the Supreme Court has often recognized. Courts intervene only
19 when it's necessary to uphold a superior source of law, the
20 U.S. Constitution in this case. You're not enforcing Wisconsin
21 law. You can't.

22 And I'm the one who raised tempers. I think my
23 friend was a little confused on what the challenge was to his
24 claim, although I'll let Mr. Kelly talk about that. I think
25 the challenge really has been loss of a case or controversy.

1 The Pennhurst argument obviously is, that a federal court
2 cannot order the officers of the state to carry out state law.

3 But these ideas of core retention and compactness and
4 community of interest, they're not even in Wisconsin law.
5 They're not in our Constitution. They don't apply. Whatever
6 is in Article 4, Section 3 with respect to the legislature
7 doesn't apply to Congress. The power of the legislature to
8 draw the maps comes from the fact that the U.S. Constitution in
9 Article 1 gives it to the legislatures, and the Wisconsin
10 Constitution in Article 4, Section 1 says that's the law-making
11 body in our state. That's where it comes from. Those are the
12 rules. And there is no violation of the Constitution to
13 challenge to Act 44. It is really lacking in merit and ought
14 to be dismissed. Thank you, your Honor.

15 JUDGE STADTMUELLER: Thank you, Mr. Shriner.
16 Mr. Kelly?

17 MR. KELLY: May it please the Court, before I begin
18 my closing remarks, I do believe I need to clear up one matter
19 in particular. Mr. Poland made a suggestion that somehow the
20 Reinhart firm was involved with the filing of the state court's
21 complaint with respect to the recall issues, and just to set
22 the record straight, the Reinhart firm had absolutely nothing
23 to do with that. My understanding is that was handled by an
24 entirely separate law firm, then handed off in the middle of
25 the process, but at no point at all did Reinhart have anything

1 to do with that.

2 As far as closing remarks, it seems the plaintiffs
3 have chosen to put on two very distinct cases. One case
4 addresses the legal question; that is, has there been a
5 violation of the Voting Rights Act. The second case addresses
6 nothing but political questions. They ask whether the
7 legislature could have adopted a map that would have reflected
8 different prudential considerations. Specifically they say
9 they would have preferred to see a map that would assign fewer
10 people to new districts that would have less delayed voting
11 consequences and that there would be somehow some political
12 reason for reducing population deviation amongst the districts.
13 But each one of those is a political issue addressed to the
14 legislature and not to a court.

15 With respect to -- I will note at this point with
16 respect to Act 44 we join Mr. Shriner's arguments and comments.

17 So we start with the legal case, and we find that we
18 are not beginning this analysis in a vacuum. There's a history
19 to this and in particular we look at the last iteration of the
20 map that was drawn for the state of Wisconsin, it was drawn by
21 this Court in 2002. And we have a significant amount of
22 guidance from the Court in what constitutes a constitutionally
23 acceptable map, specifically with respect to voting rights
24 issues for the minority communities.

25 Now, Mr. Earle says he's incensed by the map that the

1 legislature adopted last year, incensed. I wonder, is he also
2 incensed by what this Court did ten years ago. Because what
3 the legislature adopted with respect to Assembly District 8,
4 which is the focus of his concern, is very close to identical
5 to what this Court did with respect to the Latino voting age
6 population in that district. Now, it's oriented a little bit
7 differently, but let's start with a couple of indisputable
8 facts.

9 The first is that in 2002 this Court drew a map that
10 had a Latino voting age population at 58 percent. Now, there
11 is no -- there's no disagreement that when this Court drew that
12 map, it was acting constitutionally. The court was not
13 violating the Voting Rights Act in creating a district with a
14 Hispanic voting age population of 58.34 percent.

15 So now we look at what they did, what happened as a
16 consequence of that map that the Court drew. Well, the people
17 in that district immediately elected a Hispanic candidate and
18 they've continued doing so ever since and have never stopped.
19 Now -- well, in fact, Assembly District 8 has been represented
20 by no one but a Latino for the past 14 years.

21 Now, the legislature, looking at that, actually went
22 a little bit better in what was able to be accomplished in
23 2002, and the legislature in 2011 drew a map, including
24 Assembly District 8, that had the Latino voting age population
25 of 60.52 percent. Now, I understand that's not citizen voting

1 age population, but for purposes of comparison we looked at
2 what the Court did in 2002, and the Court's district was
3 measured in terms of Latino voting age population, so we
4 compare apples and apples.

5 So the legislature actually did two points better in
6 drawing Assembly District 8 than the Court was able to do in
7 2002. So there's no reason to believe that the new district
8 with higher Hispanic voting age population than it had in 2002
9 will not do what it did in 2002, which is elect another
10 Hispanic representative.

11 Now, the plaintiffs say that the Hispanics need a
12 super majority of citizen voting age population to have a
13 reasonable chance to win. To agree with the plaintiffs on this
14 point would require a conclusion that this Court acted
15 unconstitutionally in 2002. It would be to conclude that this
16 Court failed to create a Latino majority-minority district. So
17 this Court did not fail in doing that in 2002, and we know it
18 did not fail for the same reason that we know that a Hispanic
19 will continue to represent this district into the future if we
20 look at what happens.

21 Now, the reason, the reason this Court did not fail,
22 without even having to look at citizen voting age population
23 when it created the district in 2002, the secret to the success
24 lies in this fact. We are looking at a partisan race. The
25 most important factor in determining whether the people who

1 live in Assembly District 8 will elect a Hispanic candidate is
2 who will win the Democrat primary. We know there's been
3 testimony, there's a high degree of correlation between --
4 between the Latino community and voting for a Democratic
5 candidate, and we know this is not a contested matter. Both
6 Dr. Mayer and Dr. Grofman agree that in Assembly District 8 the
7 primary's everything. If you win the primary, absent some
8 shocking occurrence, you'll win the general election as well.
9 So that's where we focus, that's where the focus of our
10 inquiry, the focus of our efforts need to be.

11 Now, we know that's true because Assembly District 8
12 has shown itself to be a reliably Democratic district.
13 In fact, even in new Assembly District 8, the general
14 proportion of the Republicans -- of Democrats to Republicans is
15 71 to 29. That is the very definition of a safe seat.

16 Now, based on this, Dr. Grofman looked at the
17 demographics of this district as it's been composed. He's
18 looked at its partisan makeup, he's looked at its history, and
19 he said this. Hispanic candidates can and will win Democrat
20 primaries in Assembly District 8, and having done so, will go
21 on to win the general election, because winning the primary
22 essentially guarantees winning the general.

23 So the question before us, is it possible for a
24 Hispanic to win the Democratic primary in Assembly District 8,
25 and the answer to that is yes, and here's why. First, the

1 non-minority population that's been moved into Assembly
2 District 8, and that's the population that Mr. Earle is so
3 concerned about, are largely Republicans. They're not going to
4 be voting in the Democratic primary. Largely Republican. So
5 they don't constitute a significant danger that the Democratic
6 candidates will -- that the Latino community will not be able
7 to nominate a Hispanic candidate.

8 Second, we know that other minorities are willing to
9 support Hispanic candidates and Assembly District 8 does have a
10 small but distinct population of other minorities. And we know
11 this because we can see in Exhibit 1185, we can see that
12 Judge Colon receives a significant amount of support in
13 overwhelmingly African-American Senate Districts 4 and 6.
14 There is this concept of minority voters banding together to
15 vote for a minority of choice of the larger minority, and it's
16 perfectly permissible when analyzing the Voting Rights Act to
17 look at what actually happens.

18 Now, all the numbers that we look at and all the
19 analyses, the racial polarization and all of that, they give us
20 clues, they give us insights, they tell us something about what
21 we're looking at. But what we really need to do is after
22 having looked at those flags and those indicators, we have to
23 look at what actually happens.

24 So as the Supreme Court has noted in Johnson versus
25 DeGrandy, it emphasized that majority-minority districts are

1 not always necessary to ensure that minority groups are able to
2 elect the candidates of their choice. They said this. If the
3 lesson of Gingles is that society's racial and ethnic cleavages
4 sometimes necessitate majority-minority districts to ensure
5 equal political and electoral opportunity, that should not
6 obscure the fact that there are communities in which minority
7 citizens are able to form coalitions with voters from other
8 racial and ethnic groups, having no need to be a majority
9 within a single district in order to elect a candidate of their
10 choice. And that's what we see here. We see that there is
11 this coalition building.

12 So when we look at the citizen voting age population
13 in Assembly District 8, it's not sufficient that we look only
14 at the Latino citizen voting age population. We need to look
15 also at those other minority groups who are likely to reliably
16 vote for a Hispanic candidate, and what we find is that there
17 is sufficient minority population there that in the Democratic
18 primary the Hispanic candidate has, at the very least, an equal
19 opportunity to win.

20 Now, going into that aspect a little bit further, as
21 we all know, Gingles, Thornburg versus Gingles has three prongs
22 that need to be there. First, the large compact community,
23 sufficient to form at least one district, and certainly that's
24 true here.

25 So then we move on to Gingles prong two where we're

1 looking at political cohesion, and what we find in
2 Assembly District 8 is perhaps not the easiest picture to look
3 at. It is a little complex but what we see is this.
4 Distilling all of the testimony that we've heard and all of the
5 documents that have been submitted to the Court, what we see is
6 this. When Hispanics vote together, they win. When they
7 don't, they lose. Sometimes they vote together; sometimes they
8 don't.

9 So here's how we need to look at cohesion. We look
10 first at what are called endogenous races. That is, testing
11 the races that are actually at issue. In this case it would be
12 Assembly District 8, races for that -- for that seat. Now, we
13 can't really do that here but for a very interesting reason.
14 We can't do it because more often than not there's no contest,
15 and the reason for that is because the Hispanic candidate is so
16 dominant in this district that no one even bothers to challenge
17 him. That's been the history in Assembly District 8.

18 So having found no illustrative evidence there other
19 than the fact that Hispanics consistently win in
20 Assembly District 8, we go to the second layer of evidence, and
21 what we look at is exogenous partisan races in which there's an
22 identifiable Hispanic candidate, and we do that to find out if
23 there is any, if there's any evidence of cohesive voting. And
24 what we find is that when there is that partisan flag, right,
25 then the Hispanics are more likely to vote together than when

1 there's not a partisan flag. When there's non-partisan races,
2 as Dr. Mayer's political cohesion test on Exhibit 1025 -- but
3 you don't need to bring it up, it's hard to look at -- in that
4 exhibit Dr. Mayer demonstrated that in nine, nine partisan
5 races it's basically a tossup whether the Hispanic community is
6 acting in a politically cohesive way.

7 And Dr. Grofman went through a considerable amount of
8 testimony, considerable amount of analysis and discussion in
9 looking at that very question. He clearly made a distinction
10 between partisan races and non-partisan races, and the reason
11 he did that is because when we look at partisan races, we are
12 adding additional influence into the analysis, and it's the
13 party tag, and we know from the undisputed testimony that the
14 Latino community is much more likely to vote for a Democratic
15 candidate than they are for a Republican candidate. So when we
16 focus on partisan races, we are looking not necessarily at
17 whether the Latino voters are casting their vote for someone
18 because of their ethnicity as much as they are casting their
19 vote because of their party affiliation.

20 So then we go to the next level of evidence, and
21 those are the exogenous non-partisan races, and that's where we
22 find there's no clear evidence of cohesion. So when we look at
23 the races that Dr. Mayer analyzes -- and these are the races
24 that he chose to look at. He picked these out for the purposes
25 of analyzing racial cohesion. And what we find is that in that

1 confidence interval, on five out of the seven of those races,
2 the confidence interval extends below 50 percent. Now, it also
3 extends slightly above 50 percent, but what that tells us is
4 it's a flip of the coin. You've got no more than half of the
5 Hispanic community supporting five of the seven people in the
6 races that Dr. Mayer chose. Half. That's no evidence of
7 cohesive voting but that's what we -- that's the best evidence
8 that we have because it's non-partisan. So the party tag is
9 not an indicator, it's not an influence under voting behavior.
10 We're looking strictly at are they preferring people because of
11 their ethnicity or not, and it's a flip of the coin.

12 Now, there are two races that he picked in which the
13 confidence interval did not go below 50 percent, but we could
14 say, well, it does look like they voted together there, but
15 that goes back to what we were saying earlier about when
16 Hispanics vote together, they win, because those two races were
17 Judge Colon and he won both of those races.

18 And that's significant because under the third prong
19 of Gingles what we have to do is figure out if the non-minority
20 population votes in a way, in a block, in a way that is
21 sufficient to prevent the minority candidate from winning. And
22 what we find is when the Hispanic vote together, they can't
23 stop them from winning and they have won and won consistently.

24 So there's not a -- on Exhibit 1025 there's not a
25 single race there that tells us that there is a violation of

1 the Voting Rights Act. We have to strike them out because they
2 don't show cohesion or we have to strike them out because
3 there's no evidence that the non-minority community was able to
4 prevent the minority candidate from winning because the
5 minority candidate did win.

6 So let's look at what the real aspect of this
7 question is. And there is a -- there's currently a
8 representative of Assembly District 8. Her name is JoCasta
9 Zamarripa. She is a Hispanic. The question before the Court
10 is will she win, will she have an equal opportunity to win in
11 2012. That's the real question here, and we can talk about
12 numbers all we want and that gives us some good information,
13 good and useful information as Dr. Mayer gave us in
14 Exhibit 1025.

15 But really, when we get to real life, when we step
16 out of this building and we see what happens in November of
17 this year, we want to know will JoCasta Zamarripa have an equal
18 opportunity to win. Well, and it's not just win the general,
19 right? We've got to step back and we say is she going to win
20 the primary.

21 Well, we don't know anything about that from
22 Dr. Mayer. We know nothing about that. Dr. Mayer conceded
23 that none of the political or none of the racial polarization
24 studies that he did say anything about who's going to win the
25 primary in Assembly District 8. Nothing. There's not a scrap

1 of evidence presented to this Court by the plaintiffs to tell
2 you what's going to happen or what's likely to happen in the
3 primary for Assembly District 8, and Dr. Mayer conceded that
4 the primary's the thing. That's the race we need to be
5 concerned about. So there's no evidence for the plaintiffs to
6 show that JoCasta Zamarripa is not going to be able to win the
7 Democratic primary.

8 Now, can we bring up Exhibit 1186, please. Now, the
9 plaintiffs are concerned about the new non-Hispanics that have
10 been assigned to Assembly District 8. They say these are high
11 turnout white voters and they're going to frustrate the Latino
12 community's ability to elect a candidate of their choice. But
13 when we look at -- when we look at a race that analyzes that,
14 we find an entirely different story.

15 So what we see in this Circuit Court race between
16 Pedro Colon and Christopher Lipscomb is this. The top part of
17 the chart are those -- are those wards that were in the old
18 Assembly District 8 and are in the -- still in the new
19 Assembly District 8. And we see that Judge Colon won -- this
20 is historical fact -- Judge Colon won with 69.7 percent of the
21 vote. So clearly the wards that were already in
22 Assembly District 8 has no problems.

23 So the question is what happens with the wards that
24 are being introduced, the ones that the plaintiffs are so
25 concerned about are going to destroy their ability to elect a

1 Hispanic candidate. Well, let's look at the bottom of that
2 chart. What we see is in those new wards that have been
3 brought in, it's 51.8 percent, and might I remind you, of
4 course this is a non-partisan race, non-partisan. So we're not
5 even looking at a Democratic primary. We're looking at a
6 general election, 51.8 percent. No partisan tag to give any
7 guidance, no partisan tag to influence voting behavior, and yet
8 over half voted for Judge Colon.

9 Now, that percentage I think is a useful comparison
10 to the percentages that Dr. Mayer was getting in Exhibit 1025.
11 I mean, he had -- he had estimates and guesses and ranges of
12 confidence, and the range of confidence fell below 50 percent
13 and he said, oh, that's good enough. That's good enough for us
14 to tell that that -- that the Hispanic community is acting in a
15 cohesive way.

16 Well, if that's true, then it's also true that the
17 members that live in these new wards that have been added to
18 Assembly District 8, they're acting in a cohesive way in favor
19 of a Hispanic candidate. That number's higher than the ones
20 that Dr. Mayer came up with five -- with respect to five of the
21 seven races that he put in his racial polarization analysis.
22 This tells us that the additions to Assembly District 8 will
23 not be a problem for the Hispanic candidates.

24 Now, we're still operating at one level of
25 abstraction, I think, from the reality on the ground. There is

1 one person who is more directly affected by this map with
2 respect to Assembly District 8 than anyone else in the state,
3 one person, and that person is JoCasta Zamarripa. She's the
4 incumbent. She's the one that's going to be running for
5 reelection in 2012. She's the one that if there's a problem
6 with this district is going to be the most concerned. She's
7 the one that has to deal with this problematic new part of her
8 district, if it is, indeed, problematic.

9 But she didn't say it's problematic. In fact, let's
10 see what she did say. It's Exhibit 19. And we'll go to
11 page 33, please -- 133, 133, please. Thank you. All right.
12 And you saw this today but it's worth -- it's worth going over
13 again. The 8th and 9th, the 8th is my district. It is a
14 Latino super majority district. The 9th was trending that way.
15 It has already been a Latino-influenced district and this does
16 give us a larger percentage. But the truth is that you know
17 that Latinos have grown by leaps and bounds here. And we were
18 trending that way anyway. It's almost inevitable. We just
19 grew it. It's not that you created another one. There's not
20 three now. She was content with what the legislature did in
21 this case.

22 Now, if she was really worried about her chances,
23 don't you think that she would be beating down the door of the
24 Voces plaintiffs or the Baldus plaintiffs and saying, "Let me
25 come in. Let me come in and tell this Court how problematic

1 this is going to be for me. Let me come in and explain to them
2 what kind of problems I'm going to have running for reelection.
3 Let me come in and tell you what this is doing to my community
4 that I represent." Well, JoCasta Zamarripa wasn't here. There
5 are circumstances in which silence says an awful lot. After we
6 see what Miss Zamarripa said in the public hearing on this
7 legislation, that silence says she's not concerned about what
8 the -- what Act 43 does with respect to Assembly District 8.

9 So what does this evidence say about how we should
10 look at Assembly District 8? Well, we first need to look to
11 the past. Hispanics have not lost that seat for 14 years. And
12 we need to look to the present. The incumbent is grateful for
13 the district that Act 43 created, her district,
14 Assembly District 8. And we need to look to the future. It's
15 only going to get better.

16 The Hispanic community continues to grow by leaps and
17 bounds. Not only is Assembly District 8 going to stay a Latino
18 majority-minority district, but 9 is going to become that way
19 as well, something that would not happen if the plaintiffs had
20 their way. They would reduce Assembly District 9 down to a
21 nub. It would have no realistic opportunity of growing into a
22 majority-minority district over the next ten years. The real
23 person who would have a complaint says she's fine with this.
24 She's grateful for it and she's not here today to tell you
25 otherwise.

1 All right. So what about the political case? The
2 plaintiffs complain there's no testimony to support every
3 decision on where to put every district line in Act 43. Well,
4 they're right. There's not, nor could there be. This is an
5 iterative process that took months to do and required a staff
6 of people to accomplish. This is -- this is not a situation
7 where you can document every single decision on every district
8 line on every single iteration until you get to the final
9 process -- to the final product. It's not realistic.

10 And besides, ignore the deposition testimony that's
11 been designated in this case. Joe Handrick has described the
12 concepts that directed how they made the decisions on where to
13 draw the lines. Tad Ottman did too and Adam Foltz had some
14 input on that as well, and that's in the record. These are
15 the -- this is the best that you can do in describing why
16 specific decisions were made. One decision, as Dr. Mayer said,
17 one decision branches out into many others and it has a ripple
18 and a cumulative effect. Well, that's very true, it does, and
19 that's what happened in this process, and to expect individual
20 legislators to come into this Court and explain why every line
21 was where it was is just not realistic.

22 Now, let's take a look at their actual complaints
23 with respect to politics. Well, we start with equal
24 population. Now, that could be a legal claim. There is a
25 requirement that you -- that you have a minimal amount of

1 population deviation. So that could have been a legal claim,
2 but it can't be in this case because the population deviation
3 was .76 percent. That's miniscule. And as Dr. Gaddie
4 testified, he's unaware of any Court anywhere that has ever
5 struck down a map that had a population deviation lower than
6 9 percent, 9 percent. This is an order of magnitude lower than
7 that. So there's no legal impediment here. It can only be a
8 political impediment.

9 Now, they didn't present any evidence of what
10 political goal would be achieved or served by reducing
11 population deviation any further than it already was. They
12 didn't introduce any evidence of any lawful obligations that
13 were violated by having the population deviation where it was.
14 So there's no evidence before this Court whatsoever on which to
15 find that there is any problem with the population deviation.

16 And then the balance of the plaintiffs' case does
17 nothing more than present their misunderstanding that the role
18 of traditional redistricting principles encases reviewing a
19 redistricting plan. This Court is doing something it hasn't
20 done for 30 years now. It's not drafting a map. It's
21 reviewing a map that was adopted.

22 Now, it's different when you are in the position of
23 drafting a map in the first instance. Well, that's when you
24 look at these traditional redistricting principles. They help
25 guide your decisions. They are, for lack of a better term,

1 best practices. It gives you parameters and guidelines and
2 helps you get to a final product that has some coherence.

3 But in reviewing a map that has been adopted, the
4 reviewing Court is no longer in the position of drafting. It's
5 reviewing. So these political considerations, these political
6 factors, prudential factors, they fall by the wayside. These
7 are not legal standards. These are considerations that go into
8 guiding those with the responsibility for drawing a map. It
9 helps them to make their discretionary decisions.

10 Now, in the -- that's not to say that they don't have
11 any place in a Court's review of the map, but it's a very
12 different place, and here's what it is. If there is a
13 violation of a legal requirement, then the Court can look to
14 these traditional redistricting principles to see if they
15 justify that violation. So, for example, let's say that
16 instead of .76 percent population deviation there was instead
17 10 percent population deviation. And the Court were to say,
18 I'm sorry, that's too high. As a legal matter, that's too
19 high. You could look then at these traditional redistricting
20 principles to see if the legislature was pursuing one of those
21 and that that's what caused the higher population deviation.
22 That's the role in a Court review of these kinds of principles.
23 They're not legal standards at all. In fact, in this -- in
24 this context they are a rationale for not meeting a legal
25 standard.

1 Now, as the Court has reminded the parties on a
2 number of occasions, drafting a map is the province of the
3 legislature, not the Court, and that's because it is a
4 political act to adopt a redistricting map, and because it's a
5 political act, it best fits within the political branch. So
6 that if the people that they represent are not content with the
7 decisions they make, they can hold them accountable, and the
8 people of Wisconsin are most capable of doing that.

9 We had a round of recall elections last summer
10 because the legislature made decisions that some people were
11 very unhappy about. We're going to have some recall elections
12 coming up this summer because there are people who are still
13 very unhappy about some of the decisions the legislature has
14 made. They can hold them accountable, and it's that place that
15 the map needs to be drawn so that they can be held politically
16 accountable if they adopt a map that is repulsive to the people
17 of the state of Wisconsin.

18 So let's look at the individual worries that the
19 plaintiffs have. They address the question of population
20 movement, or as they times call it, core retention. They call
21 it an equal protection violation but they don't identify any
22 right that's being violated. It does devolve once again into a
23 political factor. And, in fact, as Dr. Gaddie testified, they
24 didn't even properly identify the topic that they were talking
25 about.

1 All of this talk about least change and the required
2 number of people to move or to be reassigned to a new district,
3 there was no foundation for any of that conversation, because
4 the first thing they have to do is figure out, well, how many
5 people do you actually -- is it actually necessary to move, and
6 they didn't do that. And the reason they didn't do that is
7 because you can't just look at a map that shows population
8 inequality and say we need to add ten here and subtract there
9 and therefore the total population movement necessary is 20.
10 You can't do that. As Dr. Mayer testified, when you make a
11 decision to one part of the map, it's going to ripple out.

12 So what you have to do first is you would have to
13 draw a map with the sole goal in mind of moving the fewest
14 people necessary and then count it up and see how many you
15 moved. Well, Dr. Mayer didn't do that. He didn't draw any
16 map. He has no idea how many people it's necessary to move to
17 get to population equality. No idea.

18 With respect to delayed voting, and again, this is
19 one of these political considerations, and this is political
20 because there's not really -- we talk about disenfranchisement
21 as if somebody's right to vote is being taken away, but that's
22 not really true. Let's be clear about what's happening.
23 November comes along. You go to your polling place, everybody
24 gets to go to their polling place and there's going to be a
25 ballot presented to them and they're going to be able to vote

1 for everybody that's on the ballot.

2 Now, for those who are affected by delayed voting,
3 there's simply not going to be a state senator on the ballot.
4 Now, that's not nothing but it's not a legal requirement to
5 eliminate that. If it was we'd have to change our
6 Constitution. So this can't be an issue of constitutional
7 magnitude because our Constitution says four-year staggered
8 terms. You're always going to have some delayed voting effect.

9 So what did Dr. Mayer tell us today? Well, he told
10 us about maps that he testified to ten years ago and he said
11 that the maps that he -- in which he testified in favor of were
12 on the neutral principles. They were superior to the
13 Republican maps. Well, each of the maps that he supported had
14 more delayed voting than any of the Republican maps that were
15 proposed at that time and they also all had more delayed voting
16 than occurs under Act 43.

17 Now, he properly pointed out that he did, in fact,
18 note in his report that on that factor the Republican maps were
19 superior, and that's a fair thing to note. But what he didn't
20 do, what he didn't say was, well, you have to reject the
21 Democratic maps because of the amount of delayed voting.
22 In fact, he said that overall on the neutral principles, like
23 delayed voting, he said the Democratic maps were marginally
24 preferable.

25 Well, and there's a reason he said that. It's

1 because delayed voting is not a constitutional issue. It's not
2 even a legal issue. It's a prudential issue, and he put that
3 in the mix with all of the other traditional redistricting
4 principles and he understands that one principle plays off
5 another and that if you -- if you drive down delayed voting,
6 that's going to affect other redistricting principles and in
7 his case partisan fairness. That's what he said he was
8 primarily concerned about in 2002.

9 So he knew that those things had some interplay. So
10 he privileged partisan fairness above delayed voting. He said
11 it's okay to have more delayed voting when I'm trying to get to
12 partisan fairness, or it's okay that I can have delayed voting
13 when I'm trying to get to another redistricting principle. So
14 he can't tell this Court that the amount of delayed voting
15 caused by Act 43 is impermissible. He can't because he told
16 the Court ten years ago that it's not.

17 Now, the other factor that he dismisses very lightly
18 is that we're really not talking about 299,000 people who would
19 go six years between voting for Senate. As we've all noted,
20 and it's indisputable, we had recall elections this past
21 summer, and there were approximately 160,000 or so who lived in
22 districts where there was a recall election. So they voted for
23 Senate last summer. That means they're only going to go three
24 years between voting for a senator.

25 And Dr. Mayer didn't explain why that was an

1 irrelevancy, why it's an irrelevancy to vote -- oh, dear.
2 Thank you. Apologize. He didn't explain why there was an
3 irrelevancy to vote for a senator in one election but not in
4 another. He began by saying the constitutional violation is
5 that you go six years between votes for senator. So we showed
6 them evidence that there are 160,000 people who only go three
7 years, and he says don't pay attention to that. It's not
8 really the amount of time, as it turns out. It's that you must
9 vote on a schedule of every four years and that's the interest
10 that must be protected, even though ten years ago he said it
11 was okay not to. And again, they address the standard to the
12 wrong body. This standard is addressed to the body that drafts
13 the map in the first place.

14 Now, briefly on recall, their count nine, there
15 simply is no case or controversy here. We have expressed in
16 open court that it is the GAB's position that they will conduct
17 the recall elections this summer under the districts developed
18 by this Court in 2002. It is a necessity for the Court subject
19 matter jurisdiction that there be a case or controversy that
20 persists all the way through to judgment, but based on our
21 representations to the Court, there is now and has not been for
22 some time now any case or controversy with respect to which
23 districts the recalls will be conducted in. And so there is
24 no -- there is no jurisdiction to address that question.

25 Now, finally, we understand that Act 43 does not please

1 everyone. I know. There is no map that will please everyone.
2 This is a political process and political decisions are not
3 going to be universally accepted.

4 What we do know is that in this case the representatives of
5 the people of the state of Wisconsin adopted this map. This is
6 their judgment, and it's inappropriate for a small group of
7 people dissatisfied with the political aspects of a map to come
8 to this Court in an attempt to reverse the legitimate political
9 decisions embodied in Acts 43 and 44. Your Honors, we request
10 that you dismiss the complaint. Thank you.

11 JUDGE STADTMUELLER: Thank you, Mr. Kelly. On behalf
12 of the Court and our respective staffs, I want to express our
13 collective sincere appreciation. The case was very hard
14 fought. It's been a very long process, a very focused process
15 in the last couple of days, but nonetheless, one that I think
16 in the final analysis will provide the Court with appropriate
17 set of facts against the guiding legal principles to issue a
18 written decision that will be forthcoming in the coming weeks.
19 The Court stands adjourned.

20 THE BAILIFF: All rise.

21 (Proceedings adjourned at 9:08 p.m.)
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25

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WISCONSIN
3

4 I, MICHELLE HAGEN, RPR, Official Court Reporter for the
5 United States District Court, Eastern District of Wisconsin, do
6 hereby certify that I reported the foregoing proceedings, and
7 that the same is true and correct in accordance with my
8 original machine shorthand notes taken at said time and place.
9
10

11 Dated this 27th day of February,
12 Milwaukee, Wisconsin
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14

15 _____
16 Michelle Hagen
17 Official Court Reporter
18 United States District Court
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